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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA, : 15-CR-00637 (KAM)
:
Plaintiff, :
: United States Courthouse
-against- : Brooklyn, New York
:
EVAN GREEBEL, :
: Tuesday, December 19, 2017
Defendant. : 10:45 a.m.
-----X

TRANSCRIPT OF CRIMINAL CAUSE FOR JURY TRIAL
BEFORE THE HONORABLE KIYO A. MATSUMOTO
UNITED STATES DISTRICT JUDGE
BEFORE A JURY

A P P E A R A N C E S:

For the Government: BRIDGET ROHDE, ESQ.
Acting United States Attorney
Eastern District of New York
271 Cadman Plaza East
Brooklyn, New York 11201
BY: ALEXIS ELEIS SMITH, ESQ.
DAVID PITLUCK, ESQ.
DAVID KESSLER, ESQ.
Assistant United States Attorney

For the Defendant: GIBSON DUNN & CRUTCHER
200 Park Avenue, 48th Floor
New York, New York 10166
BY: REED BRODSKY, ESQ.
JOSHUA EVAN DUBIN, ESQ.
MYLAN LEE DENERSTEIN, ESQ.
WINSTON Y. CHAN, ESQ.

Court Reporter: DAVID R. ROY, RPR
225 Cadman Plaza East
Brooklyn, New York 11201
drroyofcr@gmail.com

Proceedings recorded by Stenographic machine shorthand,
transcript produced by Computer-Assisted Transcription.

Proceedings

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1 (In open court; outside the presence of the jury.)

2 THE COURT: All right. Are the parties ready to
3 bring the jurors in?

4 MR. DUBIN: Yes, Your Honor.

5 THE COURT: I just wanted the also mention if we
6 could do the sidebars I'm going to probably not come down
7 the stairs. I have a problem with my knee today, so if we
8 could just do it here at the right, but I would like to
9 avoid the stairs.

10 MS. DENERSTEIN: Okay, sure.

11 THE COURT: Hopefully we won't have sidebars.

12 (Pause in proceedings.)

13 (Witness takes the witness stand.)

14 THE WITNESS: Good morning, Your Honor.

15 THE COURT: Good morning.

16 (Jury enters the courtroom.)

17 (Jury present.)

18 THE COURT: All jurors are present. Please have a
19 seat.

20 You may continue your direct examination and,
21 Mr. Dooley, you are still under oath.

22 J O S E P H D O O L E Y,

23 called as a witness, having been previously duly

24 sworn, was examined and testified as follows:

25 DIRECT EXAMINATION (CONTINUED)

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1 BY MS. DENERSTEIN:

2 Q Good morning, Mr. Dooley.

3 A Good morning.

4 Q Can I have you, please, look at Defense Exhibit 118-26A
5 to begin with.

6 A Yes.

7 MS. DENERSTEIN: Mr. Carter, can you pull that up
8 for us, please.

9 Q And I'm going to direct your attention to Page
10 Number 676.

11 A Yes.

12 Q So these are minutes from the April 22nd, 2013,
13 meeting, correct?

14 A Yes, correct.

15 Q Turning the page to Bates Number 677.

16 MS. DENERSTEIN: Mr. Carter, if you could blow up
17 the second Further Resolved paragraph on the bottom of that
18 page.

19 Q Mr. Dooley, I believe at the break yesterday, this is
20 what you read to the jury.

21 A Yes, I believe it was.

22 Q And this paragraph says what?

23 MR. KESSLER: Objection to the form.

24 Q What does the paragraph do? What does the paragraph
25 state?

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1 A It authorized --

2 MR. KESSLER: Objection.

3 THE COURT: Well, if you want to just ask him, I
4 think that might just be the best way to --

5 Q Okay. You can read it again.

6 A Further resolved the chief executive officer --

7 Q I'm going to ask you to just slow down a little bit.

8 A And he hereby is authorized empowered and directed in
9 the name and on behalf of the company to execute and deliver
10 any and all employment and consultant agreements from
11 employees and consultants to the company, provided that such
12 employees or consultants are not material to the company and
13 that their agreements would not be required to be disclosed
14 in a current or periodic report filed with the Securities
15 and Exchange Commission.

16 MS. DENERSTEIN: Mr. Carter, could you now blow up
17 the first Further Resolved on the next page, which is 678.

18 Q Mr. Dooley, could you please read that paragraph to the
19 jury.

20 A Further resolved that the chief executive officer be
21 and he hereby is authorized, empowered and directed in the
22 name and on behalf of the company to execute and deliver any
23 and all agreements that do not require payments of a
24 material amount of cash or equity and which are not required
25 to be disclosed in a current or periodic report filed with

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1 the Securities and Exchange Commission.

2 Q Now, I would like to direct Your to Binder 2, Tab A,
3 Government's Exhibit 565.

4 A Yes.

5 Q Can you read the --

6 MS. DENERSTEIN: Can you scroll down, Mr. Carter.

7 Q And read the bottom e-mail.

8 MS. DENERSTEIN: Mr. Carter, can we go back up to
9 257? Great. Stop right there. Perfect.

10 Q Is this an e-mail from Alan Geller to Evan Greebel on
11 April 18, 2013?

12 A It is.

13 Q And what does the e-mail state?

14 A Evan, can we move on this agreement today, meaning
15 Friday? Al Geller.

16 MS. DENERSTEIN: Can we move up to the next e-mail
17 please, Mr. Carter? Blow that up.

18 Q And is this an e-mail from Evan Greebel to Martin
19 Shkreli the same date?

20 A It is.

21 Q And what does it state?

22 A Consulting agreement is done. I need the transfer
23 numbers from you to tie up that piece.

24 MS. DENERSTEIN: Can we go up to the next e-mail
25 above.

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1 Q And is that an e-mail from Martin Shkreli to Evan
2 Greebel?

3 A Evan Greebel, yes.

4 Q And what does it state?

5 A Send me drafts.

6 MS. DENERSTEIN: Can you go to the top of the
7 chain.

8 Q Is that an e-mail from Evan Greebel to Martin Shkreli
9 on April 19th, 2013?

10 A Yes, it is.

11 Q And what does it state?

12 A Attach is a draft of a form. I think you should get
13 blanket approval from the Board before you retain
14 consultants who may be paid in cash or stock up to an
15 aggregate amount of blank dollars.

16 Q And is this date, April 19th, how far ahead of the
17 April 22nd, 2013, Board meeting is that?

18 A Three days.

19 Q Okay. Let's turn back to the Board minutes, 678. And
20 118 -26A, Defense Exhibit. Bates Number 678.

21 A Yes.

22 Q Do you see the signature on that page?

23 A I do.

24 Q And what's the name?

25 A Evan Greebel, acting secretary.

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1 Q And let's now skip ahead to the September 9th, 2013,
2 Board meeting minutes contained in DX 118-26A.

3 5700 Bates Number.

4 A Yes.

5 Q Okay. We briefly discussed this, I think, last week.
6 But can you remind the jury who was present at that meeting?

7 A Martin Shkreli.

8 MR. PITLUCK: Object to form who was present.

9 Q Who does the document say was present at the meeting?

10 A The following members of the Board were present in
11 person or by telephone: Martin Shkreli, Stephen Aselage,
12 Steven Richardson. Also present were Marc Panoff, the
13 company's chief financial officer, Evan Greebel of Katten,
14 Muchin, Rosenman, counsel for the company, and Edward
15 Hackert and Sunil Jain of Marcum, LLP, the company's
16 independent registered public accounting firm.

17 Q And can we skip now to Page 701. The second paragraph
18 beginning Mr. Shkreli, asked Mr. Panoff to advise?

19 A Mr. Shkreli asked Mr. Panoff to advise the Board on
20 point of matters.

21 Q Stop. Can we go to the last sentence, please.

22 A Mr. Panoff also reviewed the terms of the consulting
23 agreements offered to Al Geller and Ken Banta.

24 Q Now, let's turn to Bates to Page 702 Bates Number. And
25 in the middle of the page the Further Resolved that's the

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1 consulting agreement.

2 MS. DENERSTEIN: Can we blow that up, Mr. Carter.

3 Q Could you please read that slowly.

4 A Further resolved that the consulting agreements for Al
5 Geller and Ken Banta in or substantially in the form and
6 containing substantially the terms and provisions of the
7 consulting agreements attached hereto be and they hereby are
8 ratified, affirmed, approved and adopted in all respects and
9 that subject to the execution of such consulting agreements,
10 you authorize officers B and each of them hereby is
11 authorized, empowered and directed in the name and on behalf
12 of the company to execute and deliver the consulting
13 agreements with such changes, modifications or amendments
14 thereto as the authorized officer executing the same shall
15 approve the execution and delivery thereof to be conclusive
16 evidence of such approval.

17 Q Now I'm going to ask you to go back to Binder 2 and
18 turn to Tab E, Defense Exhibit 8207.

19 A E as in Edward?

20 MS. DENERSTEIN: Yes.

21 THE COURT: Yes.

22 Q Defense Exhibit 8207 in Binder 2. It is followed --

23 A Yes, yes, I'm sorry.

24 Q That's okay.

25 A Yes, 8207.

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1 Q Okay. Is this an e-mail from --

2 MS. DENERSTEIN: Let's go to the bottom e-mail
3 first.

4 Q Is this an e-mail from Marc Panoff on September 4,
5 2013, to Evan Greebel with the subject line Telephonic Board
6 Meeting Agenda 9/6/2013?

7 A It is.

8 MS. DENERSTEIN: Can we go back.

9 Q And is this a response from Mr. Greebel to Mr. Panoff
10 on Wednesday, September 4, 2013, with an attachment
11 Telephonic Board Meeting Agenda 9/6/2013?

12 A Yes, it is.

13 Q And what does the e-mail state?

14 A Please see comments.

15 MS. DENERSTEIN: Can we turn to the next page,
16 which is Bates Number 468.

17 Q And what does the top of the document state?

18 A Retrophin, Inc., Telephonic Meeting of the Board of
19 Directors Agenda Friday, September 6th, 2016.

20 MS. DENERSTEIN: And can we go down the document.
21 Keep going.

22 Q And what is Item Number 10?

23 A Approve retaining Al Geller, Ken Banta and Darren
24 Blanton as consultants.

25 Q And is and Darren Blanton in a parenthetical?

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1 A Yes.

2 Q In parentheses?

3 A Correct.

4 Q Can you goes to the next number.

5 A 11, review and approve an indemnification agreement for
6 directors and officers.

7 Q The next number?

8 A 12 is --

9 Q Wait, hold on. Hold on. Let the jury catch up to you.
10 I'm sorry, 12?

11 A Discuss status of filing S1.

12 Q And Number 13?

13 A Management update.

14 Q Are these edits in Track Change?

15 A Yes.

16 Q And can you explain the track changes to the jury?

17 A Sure. Whenever you make an edit to a document it
18 highlights on the left and underlines whatever has been
19 changed on a document, marks it up.

20 As you see on the top of the page if you go back
21 up to the top of the page somebody deleted the and that was
22 scratched off.

23 And then if you go back down to 10, 10 was added,
24 11 was added, 12 was added and then management update was
25 moved down to 13 because it had moved because of those three

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1 additions to this agenda.

2 Q And is this the document that was attached to the
3 e-mail that Evan Greebel sent to Marc Panoff?

4 A It was -- or it is.

5 Q Okay. Let's turn to Government's Exhibit 245. Is this
6 an e-mail from Marc Panoff on Monday, September 9, 2013, to
7 Steven Richardson, Stephen Aselage and Martin Shkreli
8 copying Evan Greebel and the subject is Board Agenda with
9 several attachments listed?

10 A Yes, it is.

11 Q And what does the e-mail state?

12 A All: Attached please find the Board agenda and all
13 supporting documents with the exception of the amended 10-K,
14 amended March 10-Q and the June 10-Q (Exhibits A through D)
15 we are waiting on comments from Martin and will have these
16 documents to you as soon as we can prior to the call.

17 Q Going up to the attachment.

18 MS. DENERSTEIN: If you can blow that up,
19 Mr. Carter.

20 Q What is attachment Exhibit J?

21 A Consulting agreement Banta.

22 Q And what is attachment Exhibit I?

23 A Geller consulting agreement.

24 Q And now I would like to direct your attention to page
25 Bates Number 6063 in this document.

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1 A Yes.

2 Q And what does the header of this document say?

3 A Consulting agreement and release.

4 Q And what individual is named in this agreement?

5 A Alan Geller.

6 Q What does the description of service state?

7 MS. DENERSTEIN: If you could just blow it up.

8 Q And read that.

9 A Consultant will serve as an advisor to the company and
10 provide consulting services (the services on strategic and
11 corporate governance matter to the management of the
12 company). Consultant shall be permitted to undertake other
13 employment or activities provided that such employment and
14 activities are not in violation of the terms of this
15 agreement or -- or compete with the business or activities
16 of the company.

17 Q I would like to now direct your attention to Bates
18 Number 6083.

19 A Yes.

20 Q And what is the title of this document?

21 A Consulting Agreement.

22 Q And who is the document between?

23 A Ken Banta and Retrophin, Inc.

24 Q And what is the description of the services?

25 A Consultant will serve as an advisor to the company and

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1 provide consulting services (the services on strategic and
2 corporate governance matters to the management of the
3 company) and over matters at the request of the management
4 of the company for each project company and consultant will
5 agree on the scope of service -- services, deliverables and
6 timetable.

7 Q If we go down the document further to Item Number 2,
8 compensation. Does this describe that part of the
9 compensation will be stopped?

10 A It does.

11 Q And going back to Bates Number 6063, the consulting
12 agreement, the draft agreement for Alan Geller, Paragraph 2,
13 Compensation. Does the compensation section describe
14 payment as stocks?

15 A It does.

16 Q Now, I would like to direct your attention to Bates
17 Number 6070.

18 A Yes.

19 Q And what is this?

20 A The Retrophin, Inc., Telephonic Meeting of the Board of
21 Directors Agenda Monday, September 9, 2013.

22 Q And can you read Item 2?

23 A Review and approve amendments to the 2012 10-K and the
24 10-Q for the quarter ended March 31, 2013.

25 Q Can we go down to Item 9 through 11.

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1 A Number 9, approved retaining Al Geller and Ken Banta as
2 consultants.

3 Number 10, review and approve indemnification
4 agreement for directors and officers.

5 Number 11, discuss status of filing S1.

6 Q Is Mr. Blanton's name listed on Item 9?

7 A It is -- no, it is not, excuse me.

8 Q Can we compare Defense Exhibit 8207 to this page, 6070
9 of Government's Exhibit 245?

10 A 245 to this one?

11 Q The to agenda?

12 A Yes. Government's Exhibit 245 or Defense 8207?

13 Q It is comparing the agenda on the back of the second
14 page of Defense Exhibit 8207 --

15 A Correct.

16 Q -- with the agenda in Government's Exhibit 245, which
17 is on Bates Page 6070 and --

18 MS. DENERSTEIN: Can we make them a little bigger,
19 Mr. Carter? Is that possible?

20 Q Mr. Dooley, can you use the computer screen or the
21 binder?

22 A The question is review them and compare them?

23 Q Yes.

24 A They're similar but there are differences.

25 Q What is the difference with respect to approving

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1 consultants?

2 A None -- well, approving -- retaining Al Geller and Ken
3 Banta as consultants. On the marked-up version Darren
4 Blanton is not listed.

5 Q Let's go through this again. On which version is
6 Darren Blanton not listed, which exhibit?

7 A On Exhibit Number 245, Government's Exhibit Number 245,
8 excuse me.

9 Q And on which exhibit is Darren Blanton included?

10 A On Defense Exhibit 8207.

11 Q Going back the Defense Exhibit 8207 the cover page --

12 A Yes.

13 Q -- Mr. Greebel is e-mailing Marc Panoff the attached
14 agenda that contains Darren Blanton, correct?

15 A Correct.

16 Q Okay. Let's turn back to Defense Exhibit 118-26A, the
17 September 9th meeting, Page Number 7700.

18 A Yes.

19 Q Can we read the paragraph that Mr. Shkreli asks
20 Mr. Panoff?

21 A Mr. Shkreli asks Mr. Panoff to advise the Board on the
22 financial condition of the company and recent accounting
23 determinations. Mr. Panoff advised the Board that
24 management of the company determined that it is appropriate
25 to restate the audited financials for the year ended

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1 December 31, 2012, and the three months ended March 31st,
2 2013, as set forth in the company's annual report on
3 Form 10-K for the year ended December 31, 2012, the 2012
4 10-K and the company's quarterly report on Form 10-Q for
5 three months ended March 31, 2013, the first quarter 2013
6 10-Q respectively.

7 Mr. Panoff explained that it would be necessary to
8 restate the subsequent event and liquidity footnotes in the
9 audited financials for 2012 and the financial statements for
10 the three months ended March 30, 2012, as well as amend
11 management's discussion and analysis of financial condition
12 and results of operation in the 2012 10-K and the first
13 quarter of 2013 10-Q, a draft of which was previously
14 provided to the Board.

15 Mr. Panoff also explained that such restatements
16 and amendments were due to noncash changes required by the
17 accounting rules as a result of various settlement
18 agreements entered into by the company.

19 Q Can we turn to Page 7701?

20 A 7701?

21 Q Uh-huh. Sorry, the next page.

22 A Yes.

23 Q Going down to the bottom, Now, Therefore Be It?

24 A Yes.

25 Q It is hereby resolved. Can you continue reading that.

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1 A That the restatement of the audited financials for the
2 year ended December 31st, 2012, and the financial statements
3 for the quarter ended March 31st, 2013, be and hereby is
4 approved in all material respects.

5 Q Can we continue to the next page, please, and could you
6 read that Further Resolved, please.

7 A Further resolved that the amendments to the 2012 10-K
8 and the first quarter of 2013 10-Q be and they hereby are
9 approved for filing with the SEC subject to final review by
10 members of the Board, and other editorial comments and other
11 minor changes deemed necessary or desirable by the chief
12 executive officer of the company and the chief financial
13 officer of the company, each an authorized officer. Filing
14 such report and the mailing of same to the company's
15 stockholders.

16 Q Can we please now turn to Government's Exhibit 247.

17 A Yes.

18 Q Is this an e-mail from Marc Panoff on September 9th,
19 2013, to Steve Richardson, Stephen Aselage, and Martin
20 Shkreli copying Evan Greebel, Ed Hackert, and Sunil Jain?

21 A It is.

22 Q And is the subject line Additional Board Documents?

23 A It is.

24 Q Are there attachments?

25 A There are.

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1 Q Can you please read the e-mail.

2 A Attached please find the latest draft of the amended
3 10-K for December 31, 2012.

4 The latest draft of the amended 10-Q for March 31,
5 2013.

6 Marcum, LLP's audit communication letter for the
7 quarter ended June 30, 2013.

8 Draft 10-Q or for the quarter ended June 30th,
9 2013.

10 Q And is the name underneath that Marc Panoff?

11 A It is.

12 Q Can we turn to Bates Number 9334 in the same document,
13 just two pages in.

14 A Yes, yes.

15 Q And what is that?

16 A It is a Form 10-K Amendment Number 1 to the U.S.
17 Securities and Exchange Commission for Retrophin, Inc., for
18 the transition period March 1 of 2012 to December 31, 2012.

19 Q I am now going to direct your attention to 9399.

20 A Yes.

21 Q Item Number 4 is titled what?

22 A Significant unusual transactions.

23 Q And going down to During the Second Quarter.

24 MS. DENERSTEIN: Will you blow that language up.

25 Q Could you please read that.

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1 A During the second quarter of 2013, the company, its
2 chief executive officer and MSMB Capital (MSMB) became
3 parties to a series of agreements to settle up to \$2,286,511
4 of liabilities which company management believes are the
5 primary obligation of MSMB. The company and MSMB have
6 entered into indemnification agreements whereby MSMB has
7 agreed to defend and hold the company harmless against all
8 such obligations and amounts, whether paid or unpaid,
9 arising from these agreements.

10 Notwithstanding the indemnification the company
11 recorded the 2,286,511-dollar charge to operations during
12 the quarter ended June 30, 2013, that was offset by a
13 corresponding liability of \$1,691,400 for the difference
14 between A, the aggregate amount of all such settlements and,
15 B, \$593,111 of cash and noncash consideration that the
16 company paid to immediately settle a portion of the
17 agreement on behalf of MSMB.

18 The \$1,691,411 is past due as of the date of this
19 filing and there is uncertainty as to whether the MSMB will
20 have sufficient liquidity to repay the company or fund the
21 indemnification agreements, should it become necessary.

22 Q And can we skip the paragraph beginning with
23 Concurrent, and go to the paragraph beginning MSMB is
24 currently in the process of dissolving its operations?

25 A MSMB is currently in the process of dissolving its

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1 operations in accordance with the new adopted accounting
2 standard 2013-04. The company has reported the full amount
3 of the settlements as a charge to its operations due
4 uncertainty as to whether the affiliate will have sufficient
5 liquidity to repay the company or fund the indemnification
6 agreements, should it become necessary.

7 Any amounts that the company may recover under the
8 note due from MSMB or under the terms of the indemnification
9 agreement if, in fact, any amounts are recovered at all
10 would be characterized as a capital contribution as the date
11 such payments are received.

12 Q If we go to the top of this page, does it say draft or
13 discussion purpose only?

14 A It does.

15 Q And is the date on the left-hand side September 9,
16 2013?

17 A It is.

18 Q And if you turn to the last page of this document which
19 is Bates Number 9405, and go to the bottom, who is this
20 from?

21 A Edward F. Hackert, CPA.

22 Q And under the very truly yours, what is the company
23 listed?

24 A Marcum, LLP.

25 Q If we go to the very next page which is Bates

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1 Number 406.

2 A Yes.

3 Q Is this the Form 10-Q that was attached to the e-mail?

4 A It is.

5 Q And for the period ended June 30, 2013?

6 A Yes.

7 Q Going to Bates Number 9414, Note 9. Related party
8 transaction.

9 MS. DENERSTEIN: Can you blow up the paragraph
10 underneath that.

11 Keep going, Mr. Carter, more, another paragraph,
12 please. Great.

13 Q Does this language describe various settlement
14 agreements?

15 A It does.

16 Q I do not think we need to read it, so we'll keep going.

17 Going to Defense Exhibit 8281. Is this the agenda
18 from the Board of Directors' meeting on Monday,
19 September 29, 2013?

20 A It is.

21 Q And are there notes written on it?

22 A Yes.

23 Q Handwritten notes?

24 A Yes, there are.

25 Q And is this Mr. Richardson's notes?

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1 A They are.

2 MR. KESSLER: Objection, lack of personal
3 knowledge.

4 THE COURT: Sustained. The court --

5 MS. DENERSTEIN: It is in evidence.

6 THE COURT: This witness does not have personal
7 knowledge of whose handwriting it is.

8 MR. KESSLER: And could we just strike that
9 question?

10 THE COURT: Yes, certainly.

11 BY MS. DENERSTEIN:

12 Q Could you go to Item 9?

13 A Yes.

14 Q And above approved retaining Al Geller, Ken Banta as
15 consultants, can you read what the handwriting says?

16 A Minute time expectations, question mark.

17 Q And going below the approved retaining Al Geller, Ken
18 Banta as consultants, can you read what the words say?

19 A Cost structures, question mark.

20 Q And can we compare this agenda to the draft agenda in
21 Government's Exhibit 245 Bates Number 6070?

22 A They appear to be identical minus the notes.

23 Q Let's turn to Defense Exhibit 1189.

24 MS. DENERSTEIN: And can we blow up the top,
25 Mr. Carter.

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1 Q Is this an e-mail from Marc Panoff sent on Friday,
2 September 13th, 2013, to Stephen Aselage, Martin Shkreli,
3 Steve Richardson, copying Evan Greebel?

4 A It is.

5 Q And does it have various attachments?

6 A It does.

7 Q And is this after the September 9, 2013, Board meeting?

8 A Yes, it is.

9 Q Can you read the text in the e-mail?

10 A Members of the Board, attached please find printer
11 versions of the amended 10-Q, amended 10-Q, June 10-Q and
12 8-K disclosing the restatements. There are a few nits that
13 need to be addressed but wanted to get these to you to
14 review.

15 Please review and approve electronically if you
16 have no comments. I will send the final docs once received.
17 I will also be forwarding the S1 registration statement
18 within the hour. Thanks, Marc.

19 Q Can we go to the bottom e-mail on this document where
20 it says Begin Forwarded Message? Is this from E Data
21 Customer Service to Michelle Griswold and copying Evan
22 Greebel and Marc@Retrophin.com?

23 A It is.

24 Q And is this the date, September 13th?

25 A It is.

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1 Q And could you read the text of the e-mail, please.

2 A Michelle, please find attached .pdfs for the 10-Q/A --
3 10-Q/A, 10-Q and 8-K for Retrophin.

4 Any questions please contact our customer service.

5 Q Can I know direct your attention to Bates Number 9336.

6 Is this the Form 10-K Amendment Number 1 attached to the
7 e-mail?

8 A It is.

9 Q And it is for Retrophin, Inc.?

10 A Yes, for the transition period March 1, 2012, to
11 December 31, 2012.

12 Q Directing your attention to Page 9366, Note 12
13 subsequent events.

14 MS. DENERSTEIN: Okay. Can we scroll down further
15 under subsequent events to the paragraph in the second
16 quarter? Mr. Carter, on the screen in front of me can we
17 move it over a little bit to the left. Perfect.

18 Q Does this paragraph describe disclosures relating to
19 settlement agreements?

20 A It does.

21 Q Is it similar to language we've previously reviewed?

22 A It is.

23 Q Would you like to read it? No, I'm just kidding.

24 Okay. Let's go to Page 9436.

25 Is this the Form 8-K that was attached to the

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1 e-mail?

2 A It is.

3 Q For Retrophin, Inc.?

4 A Yes.

5 Q Did for what period? What is the date of the report on
6 this?

7 A September 1, 2013.

8 Q Does it have a blank space where September is?

9 A A blank space?

10 Q Between September and 2013?

11 A Yes, it does.

12 Q So it does not have a one?

13 A Correct. It does not have a 1. September blank, 2013.

14 Q And now I am going to direct your attention to 9373
15 quickly.

16 A Yes.

17 Q Let's move to directing your attention to 9405, the
18 Retrophin Bates Stamp Number 9405.

19 A Yes.

20 MS. DENERSTEIN: Go to the top of that page.

21 There we go.

22 Q Is that the Form 10-Q Amendment Number 1 that was
23 attached to the e-mail?

24 A Yes, it is.

25 Q And is it for the period ending March 31st, 2013?

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1 A Yes.

2 Q And is it for Retrophin?

3 A It is.

4 MS. DENERSTEIN: Can we go back to 9373, the 10-Q,
5 cover page. Bates Number is from Retrophin.

6 A Yes.

7 Q And is that the Form 10-Q?

8 A It is.

9 Q That was attached to the e-mail?

10 A Yes. For the quarterly period ending June 30, 2013.

11 Q Okay. Let's turn to Defense Exhibit 116-75.

12 MS. DENERSTEIN: Can we go to the bottom of the
13 e-mail? Go up again.

14 Q Does the bottom e-mail state, Please find attached the
15 .pdfs for the 10-K/A, 10-Q/A and Q and 8-K for Retrophin?

16 A Yes.

17 Q And is the name addressed to Michelle?

18 A Yes, it is.

19 Q And Michelle Griswold of Kattenlaw.com?

20 A Yes.

21 Q And is Mr. Greebel copied?

22 A He is.

23 Q And is the top of that e-mail, the next e-mail Marc
24 Panoff's e-mail forwarding those documents to the members of
25 the Board on September 13th, 2013?

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1 A It is.

2 Q And is the top e-mail from Mr. Steve Aselage on the
3 same date, September 13th, 2013 --

4 A It is.

5 Q -- to Marc Panoff?

6 A It is, yes.

7 Q And what does it state?

8 A Approved.

9 MS. DENERSTEIN: Can we turn to Defense
10 Exhibit 1242 and can we go to the middle e-mail, please.

11 Q Is the middle e-mail from Steve Aselage to Marc Panoff
12 on Friday, September 13th, 2013?

13 A It is.

14 Q And what does the e-mail state?

15 A Approved.

16 Q And does the bottom e-mail contain the same documents
17 that we have just been discussing?

18 A It does.

19 Q Can we turn to Defense Exhibit 1243?

20 A Yes.

21 MS. DENERSTEIN: Can we go to the middle e-mail,
22 please.

23 Can we go up one, please.

24 Q Is this an e-mail from Steve Richardson on Friday,
25 September 13th, 2013, to Marc Panoff?

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1 A It is.

2 Q Can you read the e-mail, please.

3 A Hi, Marc. No other nit in the 10-K/A doc on the CEO
4 certification page. It lists Martin as principal financial
5 officer. I approved the documents and attached the
6 signature page. I believe there was just the one page and
7 wanted directors to sign. Let me know if there are others.
8 Have a good weekend, Steve.

9 Q Turning to Government's Exhibit 968. Is this the
10 Form 10-Q Amendment Number 1?

11 A It is.

12 (Continued on next page.)

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1 BY MS. DENERSTEIN:

2 Q And is it for the period from March 1, 2012 to December
3 31, 2012?

4 A It is.

5 Q Is it for Retrophin?

6 A Yes.

7 Q I'm going to direct your attention to page 14 of 39.
8 Should be the signature page.

9 A Yes.

10 Q Who are listed as the signatories?

11 A Martin Shkreli, chief executive officer and director,
12 Marc Panoff, chief financial officer, Stephen Aselage,
13 director, Steven Richardson, director.

14 Q Can we -- can I turn your attention to page 38, mainly
15 39, but 38, we'll start with, of this document. Note 12,
16 subsequent events?

17 A Yes.

18 Q Going to the top of the next page, "in the second
19 quarter" paragraph. Can you blow that up, please.

20 Does this paragraph describe the disclosure of
21 certain settlement agreements?

22 A It does.

23 Q Can we turn to Defense Exhibit 116-80. This is form
24 10-Q, amendment number 1?

25 A Yes, for the quarterly period ending March 31, 2013.

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1 Q And directing your attention to page 24 of 36, is there a
2 title called settlement agreements?

3 A There is.

4 Q Let me blow up that paragraph. Does this also disclose
5 certain settlement agreements?

6 A It does.

7 Q Can we turn to Defense Exhibit 116-81. Is this the form
8 10-Q for Retrophin for the quarterly period ended June 30,
9 2013?

10 A It is.

11 Q Can we turn to page 18 of 38.

12 A Yes.

13 Q Under "related party transactions," "in the second
14 quarter," does this document also have language disclosing
15 settlement agreements?

16 A It does.

17 Q Okay. Let's turn back to the minutes, please, for
18 September 9, Bates No. 7700 -- sorry, 7703.

19 A Yes.

20 Q Is that Mr. Greebel's -- is Mr. Greebel listed as the
21 signatory?

22 A He is.

23 Q And this is on the September 9 meeting?

24 A It is.

25 Q I would like to go back to Defense Exhibit 8A, which is

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1 the board meetings chart. Can we scroll down to September 9.

2 So September 29, 2013, represents the board meeting, correct?

3 A September 9, 2015.

4 Q And underneath there are various exhibits listed?

5 A There are.

6 Q How many?

7 A 11.

8 Q And are those the exhibits we just reviewed?

9 A They are.

10 Q And do they relate to topics addressed at the board
11 meeting on September 9?

12 MR. KESSLER: Objection to the form.

13 THE COURT: I'll overrule the objection.

14 THE WITNESS: They do.

15 BY MS. DENERSTEIN:

16 Q And is that how this chart is organized?

17 A It is.

18 Q Okay. After going back to Defense Exhibit 118-26A, after
19 the September 9 meeting, are there other board meetings in
20 this document?

21 A There are.

22 Q Can you turn to 704?

23 A Yes.

24 Q What day is that board meeting?

25 A September 12, 2013.

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1 Q Can we turn to the next page, numbered 706. What is the
2 date of that board meeting?

3 A September 17, 2013.

4 Q Can we turn to the next page, until we get to the
5 November 8. What is the date of this meeting?

6 A November 8, 2013.

7 Q And if you could go to who was present. "The following
8 members of the board were present." Can you continue reading?

9 A (Reading...) In person or by telephone, Martin Shkreli,
10 Stephen Aselage, Steven Richardson, and Cornelius Golding.
11 Also present were Marc Panoff, the company's chief financial
12 officer, Evan Greebel of Katten Muchin Rosenman, LLP, counsel
13 to the company, and Edward Hackert, and Ginger Pagulo, of
14 Marcum LLP, the company's independent registered public
15 accounting firm, paren, Marcum.

16 Q Can we go down to the first paragraph beginning,
17 "Mr. Shkreli began the meeting."

18 A (Reading...) Mr. Shkreli began the meeting by asking
19 Mr. Panoff to review the draft of the company's quarterly
20 report on Form 10-Q for the period ending November 30, 2013,
21 paren, the third quarter, 2013 10-Q. Mr. Shkreli then asked
22 Marcum to update the board on the third quarter 2013 10-Q.
23 Marcum delivered a report on the following issues.

24 Q Okay, great. We can stop there.

25 Can we go -- skip down to, "next Mr. Shkreli."

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1 A (Reading...) Next, Mr. Shkreli discussed the status of
2 Jeffrey Paley's nomination to the board -- to join the board,
3 noting Dr. Paley's clinical and business background.
4 Mr. Aselage and Richardson reported to the board that they had
5 each interviewed Dr. Paley over the phone and believed that
6 Dr. Paley would be an excellent addition to the board.

7 Q Can we go to the next page, 710.

8 A Yes.

9 Q The second sentence. Could you read that, please?

10 A (Reading...) Messrs. Panoff and Greebel noted that the
11 securities laws require that any stock option plan be approved
12 by the company's stockholders.

13 Q Can we go to the next paragraph, beginning, "Mr. Panoff
14 provided a management update," and skip down to "Mr. Panoff
15 then provided an update."

16 A (Reading...) Mr. Panoff then provided an update
17 regarding the company's plan to proceed with an underwritten
18 public offering of the company's common stock. Mr. Panoff
19 noted that he had spoken with several investment banks
20 interested in underwriting such a transaction. The board then
21 discussed the merits of such an underwritten offering and the
22 benefits of a listing on the New York Stock Exchange or
23 NASDAQ.

24 Q Okay. Now let's turn to Government Exhibit 251. Is this
25 an e-mail from Marc Panoff, on November 6, 201, to Neal, Steve

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1 Richardson, Steve Aselage, and Martin Shkreli?

2 A It is.

3 Q And is Mr. Greebel and Ed Hackert and Sunil Jain copied?

4 A They are.

5 Q And is the subject board agenda?

6 A Yes.

7 Q And does it contain several attachments?

8 A It does.

9 Q And what is Exhibit C, the attachment?

10 A Shkreli employment agreement.

11 Q And can I now direct your attention to page 8714. Is
12 this the agenda?

13 A It is.

14 Q That was attached to the e-mail?

15 A Yes.

16 Q And what is item numbers 2 through 5?

17 A (Reading...) Number 3, review Marcum LLP audit
18 communication letter for September 30, 2013 quarterly review.
19 Number 3, review an approval of 10-Q for the quarter ended
20 September 30, 2013. Number 4, discuss appointment about
21 Dr. Jeff Paley's appointment to the board. Number 5, review
22 an approval of Martin Shkreli employment agreement.

23 Q I'm going to turn to -- to Defense Exhibit 8901. And is
24 the bottom e-mail -- blow that up -- from Marc Panoff on
25 November 11, 2013 to nealcorneliusgolding.com, Steve Aselage,

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1 Steve Richardson, and is Martin Shkreli and Evan Greebel
2 copied?

3 A Yes.

4 Q And what does this e-mail state?

5 A Members of the board, attached, please find a marked copy
6 of the 10-Q for your review. We are keeping the face of the
7 financial statements as is for Q3 and will work to simplify
8 the line items to, quote, research and development, end quote,
9 and, quote, selling general administrative, end quote, for the
10 10-K and all subsequent filings. Please let me know if you
11 have any questions. If not, please send an e-mail approving
12 the document so we can file tomorrow. Best regards, Marc.

13 Q And what does the top e-mail state?

14 A Sounds good, okay.

15 Q And who is it from?

16 A Neal Golding.

17 Q And is it to Mr. Panoff, Mr. Aselage, Mr. Richardson?

18 A Yes, with ccs to Mr. Shkreli and Mr. Greebel.

19 Q Turning to Government Exhibit 972, is this the Form 10-Q?

20 A It is.

21 Q For the quarterly period ended September 30, 2013?

22 A Yes, it is.

23 Q And for Retrophin?

24 A Yes.

25 Q Directing your attention to Defense Exhibit 13075, what

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1 is this?

2 A It is a press release from Retrophin.

3 Q And is the title, Jeffrey Paley, MD, joins Retrophin,
4 Inc.'s, board of directors?

5 A Yes.

6 Q And could you read the first sentence, "Retrophin, Inc."?

7 A (Reading...) Retrophin, Inc., today announced that it
8 has appointed Jeffrey Paley, MD, to its board of directors,
9 effective November 15, 2013.

10 Q Going back to Defense Exhibit 118-26A, on Bates number
11 7111, 7111, again, is this -- is Mr. Greebel the signatory?

12 A He is.

13 Q And are there meetings after that date in this document,
14 in this document?

15 A There are not.

16 Q And so going back to exhibit, Defense Exhibit 8A, to the
17 November 8, 2013 date?

18 A Yes.

19 Q Are these exhibits that relate to topics described in the
20 November 8, 2013 minutes?

21 A Yes, they are.

22 Q And one quick thing, if we could go back to Defense
23 Exhibit 1348.

24 A Yes.

25 Q Can you blow up the top. Is this from Mr. Aselage?

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1 A It is.

2 Q And is it to Mr. Richardson, marc@retrophin.com,
3 nealcorneliusgolding.com, copying martin@retrophin.com, and
4 evangreebel@kattenlaw.com?

5 A It is.

6 Q And is the date Monday, November 11, 2013?

7 A Yes.

8 Q And does Mr. Aselage state you have my approval as well?

9 A He does.

10 Q And if you go down to the next e-mail, is this approval
11 for the 10-Q?

12 A It is.

13 Q Okay. Let's turn to binder 3. Do you have Defense
14 Exhibit 7A?

15 A I do.

16 MS. DENERSTEIN: This isn't in evidence yet,
17 Mr. Carter.

18 BY MS. DENERSTEIN:

19 Q Mr. Dooley, are you looking at Defense Exhibit 7A?

20 A I am.

21 Q Okay. What is it?

22 A It is a chart of the e-mail distribution of board
23 minutes.

24 MS. DENERSTEIN: Your Honor, at this time the
25 defense, subject to Your Honor's prior ruling, would like to

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1 publish Defense Exhibit 7A to the jury, as a demonstrative
2 aid.

3 MR. KESSLER: That's right, Your Honor. No
4 objection to it as a demonstrative, objection to it coming
5 into evidence as an exhibit.

6 THE COURT: All right. You may publish this Defense
7 Exhibit 7A as a demonstrative exhibit. It will not be
8 received in evidence.

9 BY MS. DENERSTEIN:

10 Q Okay. So can you read the header to the jury, please.

11 A The header, for the jury, first column on the left, like
12 all the other charts, exhibit number --

13 Q Let's stop with the very top. What does it say?

14 A E-mail distribution of minutes.

15 Q Okay. Now, let's go -- please take up from where you
16 were.

17 A Exhibit number, the far left column, the date of the
18 e-mail, the subject line of the e-mail, who it is from, who it
19 is to, and any cc.

20 Q So take us across the first column, please.

21 A Sure.

22 The Defense Exhibit 9151, was an e-mail dated
23 December 12, 2013, with a subject line 2013, board minutes,
24 from Evan Greebel to Marc Panoff.

25 Q And the "cc" is left blank because?

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1 A There was no cc.

2 Q Can we turn to Defense Exhibit 951, which is in binder 3,
3 behind tab B. It is at the very back, almost to the end.

4 A Yes.

5 THE COURT: Did you say 9151 or 951?

6 MS. DENERSTEIN: I meant to say 9151.

7 THE COURT: Okay. Thank you.

8 BY MS. DENERSTEIN:

9 Q Okay. So can you read who this is to and from?

10 A It is from Evan Greebel, to Marc Panoff, December 12,
11 2013, with a subject line 2013 board minutes.

12 Q And does it contain various attachments?

13 A It does.

14 Q And are the attachments -- do they state the words
15 "minutes" in them?

16 A They do.

17 Q And what does the e-mail state?

18 A Attached are drafts of the 2013 board minutes.

19 Q Okay. Can we -- and then attached to this e-mail are
20 there various drafts?

21 A Yes.

22 Q Can we turn to Defense Exhibit 1274. Can we go to the
23 bottom e-mail first, please. Is this e-mail, with the
24 exception of the time, identical to the e-mail in Defense
25 Exhibit 9151?

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1 A Yes, it is.

2 Q And what does it say?

3 A (Reading...) Attached are drafts of the 2013 board
4 minutes.

5 Q Going to the top of the chain, does Mr. Marc Panoff reply
6 in this e-mail to Evan Greebel on December 12, 2013?

7 A He does.

8 Q And what does he state?

9 A I'm okay with these.

10 Q And going back to Defense Exhibit 9151, if you flip
11 through the attachments, are they drafts of board minutes?

12 A They are.

13 Q Let's go to the next thing, back to chart 7A. What's
14 next on the list?

15 A DX-118-26A.

16 Q And was that the document that you -- we used in
17 connection with Defense Exhibit 8A?

18 A Yes.

19 Q And did Defense Exhibit 118-26A contain various drafts of
20 minutes from 2013?

21 A Yes. These were -- there was no draft on the top of most
22 of these.

23 Q That's correct. Actually, if you go to the cover page of
24 the e-mail, at 118-26A, can you read the statement?

25 A (Reading...) Please see the requested executed minutes.

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1 Q Let's go back then to -- actually, let's keep going and
2 go to the next document on the list, Defense Exhibit 10830A.
3 And what are these? What is the e-mail, who is it from and
4 who it is it to?

5 A E-mail to Evan Greebel from Marc Panoff, May 6, 2014 with
6 a subject line, Retrophin, March 20, 2014 audit committee
7 minutes.

8 Q And are there minutes attached?

9 A Yes, there are.

10 Q And if you turn the page to the minutes, do they say
11 "draft" on them?

12 A They do.

13 Q Turning to Defense Exhibit 10868A. Can we blow up the
14 top, the chain. Is this from davidkravitz@kattenlaw.com on
15 May 9, 2014 to marc@retrophin, copying Evan Greebel?

16 A It is.

17 Q And what's the subject line?

18 A Retrophin draft board of directors and committee minutes.

19 Q And what are the -- does this have various attachments?

20 A It does.

21 Q And do the attachments have "minutes" in their name?

22 A They do.

23 Q And could you please read the e-mail.

24 A (Reading...) Marc, attached for your review are draft
25 minutes to the following meetings, March 17, 2014 board of

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1 directors meeting, March 20, 2014, board of directors meeting,
2 March 20, 2014, nominating and corporate governance committee
3 meeting, and April 7, 2014, board of directors meeting.

4 Please let us know if you have any questions or comments.

5 Best, David.

6 Q And does this correspond with row number 5 on Defense
7 Exhibit 7A?

8 A It does.

9 Q Turning to the next Defense Exhibit, 11305.

10 MS. DENERSTEIN: Can we blow up the top, Mr. Carter.

11 BY MS. DENERSTEIN:

12 Q Is this an e-mail from Evan Greebel to -- on Monday,
13 August 4, 2013 -- 2014, excuse me, to Marc Panoff, with a
14 subject, draft audit committee minutes?

15 A It is.

16 Q And do the attachments have the words, "audit committee
17 minutes"?

18 A They do.

19 Q And what does the e-mail state?

20 A Attached are drafts of the minutes for the 5/8 and 5/14
21 audit committee meetings.

22 Q And if you turn the pages, do the minutes say "draft"?

23 A They do.

24 Q And are the minutes attached to the e-mail?

25 A They are.

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1 Q And does this correspond with the next row on the chart?

2 A It does. Row 6.

3 Q Let's turn to the next document, which is Defense Exhibit
4 11573. Is this an e-mail from Evan Greebel dated Wednesday,
5 September 24, 2014, to Meg Valeur-Jensen, with a subject,
6 2/24/14 minutes?

7 A Yes, it is.

8 Q And what does the e-mail state?

9 A (Reading...) Meg, as requested, attached are the minutes
10 from the 2/24/14 meeting of the board and the comp committee
11 as well as the various attachments that are referenced
12 therein. Thanks, Evan.

13 Q And are the minutes attached?

14 A They are.

15 Q And does this correspond with another row on the chart in
16 Defense Exhibit 7A?

17 A Yes, it does. Top row on page 2.

18 Q Okay. Let's go to the next exhibit, Government Exhibit
19 286. Is this an e-mail from Evan Greebel on September 24 to
20 Meg Valeur-Jensen?

21 A It is.

22 Q And does it -- is the subject 2014 minutes, with parens,
23 through May?

24 A It is.

25 Q And are there attachments?

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1 A Yes.

2 Q And what does the e-mail state?

3 A (Reading...) Hi, Meg. Here are the 2014 minutes from
4 January through April. I have not received the minutes from
5 May through the summer yet from my files department and will
6 send next week when I return, paren, as I assume they will
7 arrive before I am back in the office, closed paren. Thanks,
8 Evan.

9 Q Can we go to Defense Exhibit 11663, to the top e-mail.
10 Is this from Evan Greebel to Meg Valeur-Jensen on October 3,
11 2014, and is the subject "additional minutes"?

12 A It is.

13 Q And are there attachments containing additional minutes?

14 A There are.

15 Q And what does -- what does the e-mail state?

16 A (Reading...) Meg, following up on our e-mail from last
17 week, attached are minutes of board and audit committee
18 meetings in May and June. Please let me know if you need
19 additional minutes. Thanks, Evan.

20 Q Let's go back to -- and are there minutes attached?

21 A Yes, there are.

22 Q Let's go back to Defense Exhibit 7A.

23 A Yes.

24 Q On how many occasions does Evan Greebel e-mail minutes to
25 Mr. Panoff or Meg Valeur-Jensen?

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1 A Seven.

2 Q And on how many occasions does David Kravitz e-mail
3 minutes to Marc Panoff?

4 A One.

5 Q So is that a total of eight times minutes are sent to
6 either Marc Panoff or Meg Valeur-Jensen?

7 A Yes.

8 Q Okay.

9 A Can I make a correction to the chart?

10 Q Yes.

11 A In the row, the second row on page 2, GX-286, 9/24/2014,
12 in the third column under "subject," it should be 2014 minutes
13 through May, not 2013 minutes through May.

14 Q Okay. That's it for minutes.

15 A Thank you.

16 Q Okay. I'm going to ask you to turn back to binder 2, to
17 the end of binder 2, to tab F.

18 A Yes.

19 Q Okay. Do you have Defense Exhibit 9 for identification?

20 A I do.

21 Q And this is not in evidence. Can you describe what it
22 is?

23 A It is a chart listing all documents related to an M.
24 Shkreli employment agreement.

25 MS. DENERSTEIN: Your Honor, at this time, the

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1 defense would like to publish Defense Exhibit 9, subject to
2 Your Honor's prior rulings, as a demonstrative, but also want
3 to note for the record we think it should come in for
4 evidence, as a piece of evidence.

5 MR. KESSLER: So no objection to it being used as a
6 demonstrative, only.

7 THE COURT: All right. Defense Exhibit 9 is going
8 to be admitted as a demonstrative exhibit. It will not be
9 independently admitted. You may publish.

10 BY MS. DENERSTEIN:

11 Q Okay. Can you read the title?

12 A M. Shkreli employment agreement.

13 Q And can we go through the first row, again?

14 A Similar to the other charts, it lists the exhibit number,
15 the date of the document, the subject line, if any, from, to,
16 and cc. This includes documents others than e-mails. So
17 there are some at the end that are -- it is not an e-mail,
18 just a document.

19 Q Okay. And so let's start with defense exhibit, the last
20 exhibit first, which is -- should be the last exhibit in the
21 binder, which is Defense Exhibit 9016.

22 A Yes.

23 Q Is this the unanimous written consent of the board of
24 directors of Retrophin, Inc., dated November 26, 2013?

25 A Yes, it is.

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1 Q And going down the first page, stop there, the "whereas
2 the board believes." Can you read that, please.

3 A (Reading...) Whereas the board believes to be in the
4 best interests of the corporation and its stockholders for the
5 corporation to enter into an employment agreement with Martin
6 Shkreli, the corporation's chief executive officer, paren, the
7 Shkreli employment agreement, pursuant to which Martin Shkreli
8 will continue to serve as the corporation's chief executive
9 officer.

10 Q Can we go to the next "whereas" clause, please. The very
11 next one.

12 A (Reading...) Whereas, as a party to the Shkreli
13 employment agreement, Martin Shkreli has recused himself from
14 participating in any discussions of its approval.

15 Q Can we turn to page 2, which is the next page, to the
16 fourth going -- keep going, "resolved that the corporation."

17 Blow that up for the jury. Please read that?

18 A (Reading...) Resolved, that the corporation enter into
19 the Shkreli employment agreement in, or substantially in, the
20 form and containing substantially the terms and provisions of
21 the Shkreli employment agreement attached hereto as Exhibit B,
22 and that the form, terms, and provisions of the Shkreli
23 employment agreement be, and they hereby are, ratified,
24 affirmed, approved and adopted in all respects, and that the
25 officers of the corporation be, and each of them hereby is,

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1 authorized, empowered, and directed on behalf of the
2 corporation to execute and deliver the Shkreli employment
3 agreement, with such changes therein and additions thereto as
4 may be deemed necessary, appropriate, or advisable by the
5 officer executing the same on behalf of the corporation, and
6 the execution thereof by such officer to be conclusive
7 evidence of the approval by the corporation of such changes
8 and additions.

9 Q And if you keep -- let's go to Bates No. 189. Who's
10 signature is on this unanimous written consent?

11 A Stephen Aselage.

12 Q If we turn to Bates No. 190, whose signature is on this
13 unanimous written content?

14 A Steve Richardson.

15 Q If we turn to Bates No. 191, whose signature is on this
16 unanimous written consent?

17 A Cornelius E. Golding.

18 Q And if we turn to Bates No. 192, whose signature is on
19 this unanimous written consent?

20 A Jeffrey Paley, MD.

21 Q Let's go back to Defense Exhibit 1167. Let's go to the
22 top of the e-mail. Is this an e-mail from Evan Greebel on
23 Friday, November 22, 2013, to Steve Richardson, S. Aselage,
24 neal@corneliusgolding.com, jsphealth@optonline.net, and Martin
25 Shkreli?

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1 A Yes, with a cc to Marc Panoff.

2 Q And what's the subject?

3 A RTRX written consent.

4 Q And is the -- what are the attachments described?

5 A Unanimous written consent, repurchase plan, Shkreli
6 employment agreement, Shkreli employment agreement, Retrophin
7 stock purchase plan.

8 Q And what does the e-mail state?

9 A (Reading...) Gentlemen, attached is a written consent
10 for Retrophin, Inc., for the approval of Martin's employment
11 agreement, and a repurchase agreement to be entered into with
12 Ladenburg Thalmann. Also, attached for your review are copies
13 of Martin's employment agreement and the agreement with
14 Ladenburg. Please sign the unanimous written consent and PDF
15 it to me. If it is easier to fax, my fax number is. If you
16 have any questions or comments, please call me. Best regards,
17 Evan.

18 Q Okay. And is the attachment -- is the employment
19 agreement attached on page 973?

20 A It is.

21 Q Can we turn to Defense Exhibit 1294.

22 A Yes.

23 Q Is this neal@corneliusgolding on Saturday, November 23,
24 2013, e-mailing Evan Greebel, regarding the forwarded
25 Retrophin written consent?

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1 A It is.

2 Q And what does he state?

3 A "I agree with consent."

4 Q Is this document number 2 on Defense Exhibit 9?

5 A It is.

6 Q Let's turn to Defense Exhibit 8983. Is this from Steve
7 Richardson on Monday, November 25, 2013, to
8 evangreebel@kattenlaw.com to saselage@sbcglobal.net,
9 neal@corneliusgolding.com, jsphealth@optonline.net, and Martin
10 Shkreli, copying Marc Panoff?

11 A It is.

12 Q And can you just go to item -- read item -- the e-mail
13 states: Evan, I hope you have a good Thanksgiving planned
14 this week.

15 Then can you skip and read item 2.

16 A (Reading...) With regard to the CEO agreement, a few
17 points. It would have been preferable to have had the board
18 engage with the outside consultant preparing the compensation
19 strategy/plan for the company so we could see the alignment of
20 thinking with the CEO compensation, too. I realize we need to
21 lock Martin's agreement, but we should accelerate the work
22 Marc is doing with the compensation consultant and get the
23 board engaged with it. One specific language I call for under
24 3(b), at present, the bonus is left in a very vague form,
25 albeit at the board's discretion. I would like to see

DOOLEY - DIRECT - DENERSTEIN

9999

1 something along these lines added at the discretion of the
2 board based upon the specific goals and performance metrics
3 agreed from time to time with the CEO.

4 (Continued on the next page.)

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Dooley - Direct/Ms. Denerstein

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1 Q We can stop there. Okay. Let's go to Defense Exhibit
2 1295.

3 And let's go to the bottom e-mail on
4 Page 385 -- there you go.

5 Is that the e-mail you just read portions of?

6 A It is.

7 Q Can we go up one?

8 Is this e-mail from Marc Panoff back to Steve
9 Richardson, Evan Greebel --

10 A Yes, it is.

11 Q -- Aselage all the same people, Monday, November 25,
12 2013.

13 And what does Marc Panoff say?

14 A Attached, please find the analysis performed by our
15 compensation consultants.

16 Q And what does Mr. Richardson respond in the top e-mail?

17 A Thanks for sharing this. I am fine with the numbers in
18 the CEO's agreement. Skewing it to medium/long-term value
19 creation is a strong message. We can reward the short-term
20 achievements performance via the annual bonus. Happy to sign
21 the consent once Evan makes the changes to the agreement that
22 I referenced to in my earlier e-mail. Have a good
23 Thanksgiving.

24 Q Let's go to Defense Exhibit 1296. And let's go to the
25 second e-mail from -- there you go.

Dooley - Direct/Ms. Denerstein

10001

1 Blow that up, please.

2 Is this an e-mail from Evan Greebel to Steve
3 Richardson, marc@retrophin, Stephen Aselage, Neil Cornelius
4 Golding, jsphealth@optonline.net, and martin@retrophin.com?

5 A It is.

6 Q And is the date, Tuesday, November 26, 2013?

7 A Yes, it is.

8 Q What is written on the e-mail by Mr. Greebel?

9 A Gentlemen, attached is a marked revise the draft of
10 Martin's employment agreement reflecting the change that Steve
11 requested to Section 3(b). Also --

12 Q Okay. Let's stop there and just skip to the next
13 sentence. "If the revised agreement is acceptable."

14 A Please send me an e-mail confirming your approval.

15 Q And the next sentence?

16 A If you have any guess or comments, please call me at
17 (212) 940-6383.

18 Q And the next?

19 A Best regards, Evan.

20 Q What is the top e-mail from Mr. Aselage on November 26,
21 2013, to Evan Greebel and what does he state?

22 A Approved. You should have received the PDF of the
23 signature sheet yesterday. Steve.

24 Q Turning to Defense Exhibit 1298. Going to the middle
25 e-mail.

Dooley - Direct/Ms. Denerstein

10002

1 Is that an e-mail from Mr. Greebel that you read
2 previously parts of?

3 A It is.

4 Q Can we go to the top e-mail?

5 Is this an e-mail from Jeff Calais on November 26,
6 2013, to Evan Greebel. The subject: RTRX written consent?

7 A It is.

8 Q And does this -- by Retrophin written consent, does it
9 state input?

10 A It does.

11 Q And what does Mr. Calais respond?

12 A I consent.

13 Q Going to Defense Exhibit 1299. The middle e-mail is the
14 date -- is the e-mail from neil@corneliusgolding.com sent,
15 Tuesday, November 26, 2013, to Evan Greebel Re: Forward RTRX
16 written consent input?

17 A Yes.

18 Q And what does Mr. Golding respond?

19 A Evan: Okay by me. Thanks.

20 Q Now, finally, going back to what we already have reviewed
21 which is Defense Exhibit 9016.

22 So do the four board of directors with the
23 exception -- do the four board of directors --

24 MS. DENERSTEIN: Let me rephrase.

25 Q Of the five directors, do four --

Dooley - Direct/Ms. Denerstein

10003

1 Who is the person that doesn't sign the unanimous
2 written consent regarding the written employment agreement?

3 A Martin Shkreli.

4 Q Do all the other directors sign?

5 A They do.

6 Q And that document, Defense Exhibit 9016 is an approval of
7 the consent written consent to -- of Martin Shkreli's
8 employment agreement?

9 A Yes, it is. Among other things.

10 Q Going back to Defense Exhibit 9. Does this document --

11 Does Defense Exhibit 9 titled, "Martin Shkreli
12 Employment Agreement," contain the various documents we just
13 reviewed -- describe the various documents we just reviewed?

14 A It does.

15 Q Including the approvals from the various board members?

16 A Yes.

17 Q Okay. I think we are done with this section.

18 Let's turn to Defense Exhibit 6-B for
19 identification.

20 Can you describe what this is?

21 A It's a list -- it's a chart that lists when settlement
22 agreements are disclosed in certain SEC filings.

23 MS. DENERSTEIN: Your Honor, at this time, the
24 defense would like to offer Defense Exhibit 6-B into evidence.

25 MR. KESSLER: I object to it coming into evidence.

Dooley - Direct/Ms. Denerstein

10004

1 I don't object to it being used as a demonstrative.

2 MS. DENERSTEIN: Your Honor, I would like to be
3 heard on this if possible.

4 THE COURT: All right. This is not something we've
5 already discussed extensively during conference. If you must,
6 we'll hear from you.

7 Let's go to sidebar.

8 (Continued on the next page.)

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Sidebar**10005**

1 (Sidebar conference held on the record in the
2 presence of the Court and counsel, out of the hearing of the
3 jury.)

4 THE COURT: Okay. Did we talk about this one?

5 MS. DENERSTEIN: This one is different from the ones
6 we've previously discussed because, one, these documents are
7 incredibly voluminous they're two binders so there's thousands
8 of pages.

9 Two, they -- it's not just a brief -- it's not just,
10 you know, the SEC filing document, it actually lists where the
11 disclosure of settlement occurs for each one. So I think it's
12 entirely appropriate to be admitted because it's not just, you
13 know, to from who it's actually containing important
14 information about where in these documents that are very
15 voluminous as your Honor knows the settlement agreements are
16 disclosed. So I think it's an entirely appropriate chart.

17 MR. KESSLER: So that explains why it's a
18 demonstrative to show the jury where things are and not a
19 summary of voluminous records. It's not a summary of
20 anything. It's just a roadmap that the defense wants the jury
21 to have with it so the jury can find the pages that the
22 defense characterizes as settlement agreement disclosures to
23 take with and that's not appropriate under Rule 1006. Fine,
24 it's a demonstrative. I am not going to object to the
25 heading. This is exactly what Rule 1006 is not meant to

Sidebar**10006**

1 allow.

2 We've had a 45-minute discussion about these charts
3 and the fact, you know, this chart originally didn't have this
4 column, so I wasn't going to object to it because it was just
5 like the others like a demonstrative. Now, there's more in
6 here, it doesn't cure the problem, it makes worse makes, it's
7 very clear it's not a summary.

8 MS. DENERSTEIN: I respectfully disagree. These are
9 voluminous documents and there is -- it's very clear from each
10 of these, Liquidity and Capital Resources, actually disclosing
11 31 different things. So I don't think it's entirely
12 appropriate, and your Honor has completely discretion. Even
13 if it were a demonstrative to send back to the jury, courts
14 don't preclude that. But I don't think it is.

15 I do think this is different from the other ones and
16 these are very voluminous records and it would aid the jury
17 and this goes to weight. They're free to argue that the
18 disclosures are improper and that they don't agree with them
19 but they are in these documents that are incredibly weighty.

20 MR. KESSLER: I'm not objecting to that, but the
21 fact that a document is long does not make something a §1006
22 summary exhibit. A summary exhibit summarizes something,
23 that's not what this is. You don't get to send your closing
24 slides back to the jury. This is an argument about what is
25 being disclosed, how it's being disclosed, and where it's

Sidebar

10007

1 being disclosed.

2 THE COURT: I think it's sufficient, Ms. Denerstein,
3 since we spent a lot of time already discussing these types of
4 exhibits. You can publish it, you can walk the witness
5 through it. The jury has notepads, they can take notes. But
6 it doesn't go back to the jury, doesn't get admitted as an
7 exhibit in evidence. It's a published exhibit that is a
8 demonstrative and I think it would be inappropriate to
9 consider this exhibit as listing a summary of the contents of
10 the document because as you point out these form 10Ks and 10Qs
11 and S1s have a lot of other information. So it's not really a
12 summary per se it's not, you know, it's a selective
13 highlighting of specific points within a document.

14 MR. KESSLER: And, your Honor, while we're here,
15 just one planning thing so we don't have to talk about it at
16 the break. We're down to maybe six or seven documents that we
17 disagree on. So my suggestion was going to if we just come
18 back from wherever we break for lunch 15 minutes early or
19 20 minutes early, I don't think Ms. Denerstein is going to get
20 to these documents before lunch.

21 THE COURT: I have a 1:00 o'clock conference, so I'd
22 like to break for lunch soon. They've been here since 10:30
23 without a break so we can break now.

24 MS. DENERSTEIN: That would be fine.

25 THE COURT: And try to resolve the issues on these

Sidebar

10008

1 additional documents.

2 Would now be a good time?

3 MR. KESSLER: That's fine.

4 THE COURT: I have a 1:00 conference.

5 MR. KESSLER: Either way. That's fine. We can do
6 it now.

7 THE COURT: We should give them their lunch break.

8 (Sidebar concludes.)

9 (Continued on the next page.)

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Proceedings

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1 (Back in open court.)

2 THE COURT: Members of the jury, we're going to
3 excuse you for lunch at this time. I would say please be back
4 in the jury room at approximately 1:40 and we will resume.
5 Don't talk about the case and thank you for your ongoing
6 attention.

7 (Jury exits courtroom at 12:35 p.m.)

8 THE COURT: Mr. Dooley, you can step off the witness
9 stand.

10 (Witness leaves the witness stand.)

11 THE COURT: I prefer to do it now and the phone
12 conference can always be pushed back. So come back as soon as
13 you can. Thank you.

14 (A recess in the proceedings was taken.)

15 THE COURT: Let's take care of these exhibits.

16 MR. KESSLER: So we just eliminated another one from
17 issue.

18 THE COURT: Just show me the ones or tell me the
19 ones that are an issue, please.

20 MS. DENERSTEIN: Defense Exhibit 104-99 we had
21 started discussing with your Honor and that is one we are not
22 offering for the truth.

23 MR. KESSLER: So we don't object on that basis.

24 THE COURT: Okay. So you'll allow it to be admitted
25 subject to the instruction.

Proceedings

10010

1 Okay. What else?

2 MS. DENERSTEIN: Then the next one, we actually
3 would be 1314 -- we already did that one.

4 THE COURT: Defense Exhibit 1314.

5 MS. DENERSTEIN: I'm sorry. That one we already
6 did.

7 Do you have the next one, Mr. Kessler?

8 MR. KESSLER: 5458.

9 MS. DENERSTEIN: Yes, that's next.

10 THE COURT: Defense Exhibit 5458.

11 MR. KESSLER: Correct.

12 THE COURT: Are you guys using the mic?

13 MR. KESSLER: Sorry about that.

14 MS. DENERSTEIN: Okay. Better?

15 THE COURT: Yes.

16 MS. DENERSTEIN: Okay.

17 MR. KESSLER: Should we go through them one at a
18 time, or did we give you the list?

19 THE COURT: Let's go one by one, isn't that what you
20 all wanted to do because I don't have them before me right
21 now.

22 MR. KESSLER: They're all in Binder 4.

23 THE COURT: Okay. Thank you.

24 MS. DENERSTEIN: And towards the end, your Honor.

25 THE COURT: Okay. 5458.

Proceedings

10011

1 MR. KESSLER: It's most of the way to the end.

2 THE COURT: Under tab what?

3 MR. KESSLER: 5458.

4 THE COURT: H.

5 MR. KESSLER: Oh, I'm sorry. Yes.

6 THE COURT: I'm just looking.

7 MR. KESSLER: Yes, tab H.

8 THE COURT: I'm sorry. I'm just not seeing it.

9 Okay. I've got to. Sorry.

10 MR. KESSLER: December 10th e-mail.

11 MS. DENERSTEIN: It's short, fortunately.

12 THE COURT: Yes, Defense Exhibit 5458.

13 MR. KESSLER: So the objection is that the bottom

14 e-mail is Mr. Shkreli describing what he and others have

15 agreed to so it's hearsay.

16 MS. DENERSTEIN: It's actually --

17 THE COURT: Okay. Go ahead.

18 MS. DENERSTEIN: It's actually ends with a question.

19 Our hope is to -- so he's asking a question, which is not

20 hearsay, and then he's also describing what his thinking of

21 doing with respect to the Fearnow stocks. So that goes to

22 Mr. Shkreli's state of Mind and it doesn't have to be offered

23 for the truth. And then Mr. Greebel is simply responding to

24 Mr. Shkreli's questions which also go to Mr. Greebel's state

25 of mind which shows his understanding of his role and really

Proceedings

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1 his advice is that you need to talk to a tax accountant about
2 this, I don't know, I can't answer this. So its effect on the
3 listener because Evan Greebel is explaining his understanding
4 based on what Mr. Shkreli has said.

5 MR. KESSLER: Then I think we can redact the first
6 sentence in the bottom e-mail which is the one that's really
7 describing what other people thought.

8 MS. DENERSTEIN: Well, without that, I don't think
9 the rest makes sense because it's in response to that. And,
10 again, that can be not offered for the truth which we've been
11 doing lib really.

12 THE COURT: Is this relevant to any of the charges
13 or defenses?

14 MS. DENERSTEIN: Yes.

15 THE COURT: It's asking about tax implications.
16 It's not a tax case.

17 MS. DENERSTEIN: No, but it shows Mr. Greebel's
18 understanding of his role and his limited role as outside
19 counsel. It's not to actually prove that Martin Shkreli's
20 question is related to tax planning as opposed to legal
21 advice. It also, one, does have an effect on the listener,
22 Mr. Greebel, because the bottom e-mail goes to what his
23 understanding because Mr. Shkreli is telling him what they are
24 thinking of doing with the Fearnow stock and that is at issue
25 in this case. So it's the effect on the listener.

*Proceedings**10013*

1 THE COURT: It's being offered to show that
2 Mr. Greebel is performing his duties as an attorney and
3 telling him, go see a planner or a tax, you know, advisor. It
4 does then make sense to strike the first sentence and leave
5 the question for Mr. Shkreli's, Can we pay bills this way with
6 pretax money, et cetera. That last sentence would remain
7 because it's not hearsay. And then Mr. Greebel's advice as
8 counsel to -- outside counsel -- is telling him to get tax
9 advice on this.

10 MR. KESSLER: And so, we wouldn't object to that.
11 With that redaction, we wouldn't object.

12 THE COURT: Let's take out that first sentence,
13 okay, you can use it.

14 MS. DENERSTEIN: Your Honor, respectfully, we object
15 to removing that sentence because that's what A, Mr. Greebel
16 is responding to. He can't respond to whether this is a
17 taxation event without having that first sentence. And it's
18 Mr. Shkreli talking about his intent about what he's thinking
19 of doing with the Fearnow stock and that does have an effect
20 on the listener. So I think it's directly relevant to Count
21 eight, so I think it should be included but not offered for
22 the truth just as we have with other documents.

23 MR. KESSLER: Mr. Shkreli's describing what other
24 people agree to, that's my issue. The point is to show tax
25 lawyering and doing lawyer work, then the content of the tax

Proceedings

10014

1 advice doesn't matter and the question and the advice should
2 suffice to make the point.

3 MS. DENERSTEIN: He's referring to himself. He
4 says, We were thinking, not they were thinking.

5 THE COURT: So he's the lawyer.

6 MS. DENERSTEIN: Yes.

7 THE COURT: I don't think so.

8 MR. KESSLER: So we won't object with the first
9 sentence.

10 THE COURT: "Our hope is we were thinking can we pay
11 bills." I mean, I think the first sentence of the Shkreli
12 e-mail is reflecting a discussion that he's had about how to
13 structure the Fearnow stocks.

14 MS. DENERSTEIN: Which will definitely have an
15 effect on Mr. Greebel and that's who the e-mail is to. He's
16 the listener.

17 MR. KESSLER: The e-mail is being offered to show
18 tax advice. The e-mail shows tax advice with or without the
19 hearsay sense.

20 THE COURT: Right because when I asked you what the
21 relevance of this was and you said it was to show he's giving
22 Mr. Shkreli advice to seek tax expertise to straighten out
23 this question and he's not overstepping his own, you know,
24 role as outside counsel. He's saying, look, go talk to a tax
25 expert on this, a personal accountant, tax planner. I mean, I

Proceedings

10015

1 don't know what you want me to say, that's my ruling. You
2 don't have to offer it if you don't want to.

3 MR. KESSLER: The next document is 1280 --

4 THE COURT: Just to be clear, Defense Exhibit 5458
5 is going to be admissible if the defense wants to admitted to
6 with the first two sentences of Mr. Shkreli's e-mail redacted.

7 MR. KESSLER: So the next document is 1283. And we
8 will, my objection to 1283 is to hearsay, but I think a
9 not-for-the-truth instruction will satisfy that.

10 MS. DENERSTEIN: That's fine.

11 THE COURT: All right 1283. Offered not for the
12 truth.

13 What else?

14 MR. KESSLER: 1306. My objection is to the bottom
15 e-mail. Again, it's being, I'm sorry, when the Court is
16 there.

17 THE COURT: I'm there.

18 MR. KESSLER: It's hearsay about what someone else
19 is asking Mr. Greebel.

20 MS. DENERSTEIN: This goes to it's -- first of all,
21 it's not just someone else, it's Martin Shkreli and he's
22 talking about Marek Biastec, an alleged co-conspirator, and
23 they're asking about procedures and rule for bringing people
24 over the wall. He also asks if a "Confidential" is not in place,
25 confidential agreement.

Proceedings

10016

1 And Mr. Shkreli responds, there is a "confi" in
2 place for everyone. That definitely has an effect on the
3 listener, so I'm not saying it's true, Mr. Shkreli's response.
4 I think it's not being offered for the truth.

5 But then Mr. Greebel's response is that's all that
6 matters because barring that we would have a different type of
7 regulatory issue, an FD issue, so this definitely goes to Evan
8 Greebel.

9 THE COURT: What's an FD? Financial disclosure?

10 MR. KESSLER: Reg. FD. It's an SEC regulation.

11 MS. DENERSTEIN: Full disclosure.

12 THE COURT: Okay.

13 MR. KESSLER: So, your Honor, my objection is to the
14 bottom portion which is being offered for the truth to show
15 what Marek Biastec was doing if the relevance is to the fact
16 there was a statement that the confidentiality agreement is in
17 place and then otherwise there would be a Reg. FD issue then
18 the top two e-mails can come in without the bottom.

19 MS. DENERSTEIN: I mean, I think we could if avoid
20 this issue if we took out, Marek is asking me, but just left
21 of the rest of the sentence because that makes -- this can't
22 be parsed that way with making any sense. So I think if
23 that's your objection, we can get rid of those three words.

24 Is that acceptable?

25 MR. KESSLER: I don't think it's necessary to have

Proceedings

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1 any of it because I think the information is conveyed. But I
2 prefer that to the entire hearsay coming in.

3 THE COURT: So this would read -- you're taking out.

4 MS. DENERSTEIN: Marek is asking me.

5 THE COURT: The first four words. It'll read, About
6 procedures/rules for bringing people over the wall. And then
7 delete, He also asked.

8 MR. KESSLER: That makes sense.

9 THE COURT: What happens if a "Confidential" is not in
10 place?

11 Does that work.

12 MR. KESSLER: That's fine.

13 MS. DENERSTEIN: We'll do that.

14 THE COURT: First four words of Mr. Greebel's e-mail
15 dated December 31st sent at 1:47 p.m. will be redacted from
16 the first sentence. And then, with regard to the second
17 sentence, we're redacting the first three words of the same
18 e-mail, all right?

19 MR. KESSLER: So next is 1325 "confidential."

20 THE COURT: And I trust the Government if they are
21 asking for a limiting instructions --

22 MR. KESSLER: I will say something.

23 THE COURT: -- they will ask.

24 MR. KESSLER: So 1325 is an e-mail chain between
25 Mr. Greebel and Mr. Tilles about someone named Harley Lippman

*Proceedings**10018*

1 who appears to work at a company named Genesis 10. So aside
2 from some of the e-mails in here being hearsay it's not
3 relevant.

4 THE COURT: Proffer of evidence, please.

5 MS. DENERSTEIN: This is admissible to show the fact
6 that Evan Greebel received Mr. Tilles' request who is also an
7 alleged co-conspirator, so I think he is relevant. And his
8 request about a certain investment and Mr. Greebel is saying
9 in response that Mr. Tilles' characterization of the
10 investment is not correct. And it's admissible to show Evan's
11 understanding of which entity -- his understanding, not for
12 the truth his understanding -- of which entity would have
13 issued the shares to this individual who invested a hundred
14 thousand dollars. I mean, I don't care about the name of the
15 individual, but what I care about is being able to show that
16 it reflects Mr. Greebel's understanding and his state of mind
17 about what this investment should be, not that it's correct.

18 MR. KESSLER: Mr. Lippman's investment is obviously
19 not relevant to this case, so that generic -- the importance
20 of the generic understanding is not clear to me.

21 MS. DENERSTEIN: Mr. Tilles e-mailing Evan Greebel
22 as counsel asking him about what this investment -- Mr. Tilles
23 is explaining to Evan what his understanding of the investment
24 is, and Evan Greebel is responding saying what his
25 understanding is. They're both alleged to be co-conspirators,

Proceedings

10019

1 so I think it's entirely appropriate.

2 MR. KESSLER: It's about Mr. Lippman's investment
3 which isn't at issue.

4 MS. DENERSTEIN: I'm happy to redact that.

5 MR. KESSLER: The suggestion will be about an
6 investment that might be at issue.

7 THE COURT: I think it's going to make for a
8 confusing record. One, if you leave Mr. Lippman's name in,
9 the jury is going to wonder who he is and whether he's part of
10 the allege conduct. And if you leave it out, they're going to
11 assume that it has to do with one of the other investors whose
12 names have been published to the jury. I'm just not sure why
13 this particular investment is at all relevant to anything.

14 Mr. Greebel does seem to be focused on the date of
15 the investment and how it should be classified, but I don't
16 even know whether there is an issue regarding stock
17 classification in this case, so I'm not sure why it's relevant
18 at all.

19 (Continued on the next page.)
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Proceedings

10020

1 MS. DENERSTEIN: I think it is an example of
2 Mr. Greebel trying to correct misinformation that is sort
3 of, for example, Mr. Tilles for sloppy paperwork and
4 Mr. Greebel, what was his understanding of what would have
5 to be true for this to be in that document. So I think,
6 again, it goes to Mr. Greebel's state of mind and it shows
7 him giving advice and saying he could not have invested in
8 Series A preferred on that day, they were not selling
9 Series A preferred. If they had already done the merger, he
10 would have had to have invested it.

11 THE COURT: How do we advise the jury that this is
12 not in the case? This is not one of the investors that
13 matters in this case, this transaction is not charged and
14 it's not part of the defense.

15 I am just concerned that they are going to get all
16 confused and maybe read more into it than they should --

17 MS. DENERSTEIN: Your Honor --

18 THE COURT: -- about why.

19 MS. DENERSTEIN: We can move on, Your Honor. We
20 will respect the Court's ruling.

21 THE COURT: Okay. 13.5 then are not being
22 admitted? I am just asking questions.

23 MS. DENERSTEIN: No, I know.

24 THE COURT: I don't want to proffer.

25 MR. KESSLER: The next is 1315?

Proceedings

10021

1 THE COURT: Okay.

2 MR. KESSLER: And so objection to two portions,
3 that's hearsay, first.

4 THE COURT: Oh, I have a status conference right
5 now. Are they outside?

6 (Pause in proceedings.)

7 MR. KESSLER: We can just take a break.

8 THE COURT: Do you think you have ten more minutes
9 left?

10 MR. KESSLER: I think we are almost done.

11 THE COURT: Okay. 1315.

12 MR. KESSLER: So there's two hearsay portions. At
13 the bottom of the first page there is Mr. Greebel describing
14 a conversation with Mr. -- with Corey, I assume that's Corey
15 Massella from the context.

16 And then the e-mail and then the second to the top
17 e-mail. There is an e-mail from Mr. Shkreli that says been
18 in the close contact with them since -- I think he's
19 referring to Board of Directors. And so we are objecting to
20 that as hearsay to the extent it is being offered to show
21 that Mr. Shkreli was in contact with the Board.

22 MS. DENERSTEIN: Your Honor, two things. First of
23 all we would agree to redact the part that Mr. Kessler has
24 proposed on the bottom e-mail, getting rid of the, Corey, we
25 thing, blah, blah, blah. We can just redact that.

Proceedings

10022

1 This e-mail you send your Board an e-mail update
2 when you get a chance to reflect Mr. Greebel's plan and
3 understanding, which I know you are not objecting to. And
4 then Mr. Shkreli's response is critically important, not for
5 the truth because it is what he's telling Mr. Greebel.
6 Whether he did it or not, who knows, but he is telling
7 Mr. Greebel, I've been in close contact with him so there is
8 no need to do anything else. And Mr. Greebel's response is
9 reflecting the effect it has on him as a listener. He says,
10 even better. So I actually think it is critically important
11 that this comes in.

12 MR. KESSLER: That is fine. We can just do that
13 not for the truth.

14 THE COURT: I will admit the Defense Exhibit 1315.
15 (Defendant's Exhibit Number 1315 so marked and
16 received in evidence.)

17 MR. KESSLER: 1315.

18 THE COURT: Just not for the truth.

19 MR. KESSLER: So next --

20 THE COURT: And with redactions, sorry.

21 MR. PITLUCK: So next is 1010.

22 THE COURT: Okay.

23 MR. KESSLER: This is an e-mail from Mr. Shkreli
24 to Mr. Vaino and Mr. Greebel attaching an employment
25 agreement in March of 2013. So to the extent this document

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1 has any relevance, I imagine it would be to try to show that
2 Mr. Vaino entered into a employment agreement in March of
3 2013, and so this would be hearsay.

4 MS. DENERSTEIN: And, Your Honor, our response is
5 this is a verbal act. It is a document that reflects terms
6 about an employment agreement. And as you know Mr. Vaino is
7 also an alleged co-conspirator.

8 MR. KESSLER: So it is not signed. It is not an
9 executed document. It does not have any legal force. It is
10 talking about Mr. Shkreli but not by Mr. Vaino, so it is not
11 a legal document.

12 If it is being offered for the fact that this
13 document existed, the relevancy is to be attenuated.

14 MS. DENERSTEIN: I mean, I can state a relevance
15 as to Mr. Vaino's employment throughout this whole time
16 period that is at issue. I do not think it is attenuated.
17 One of the Government's allegations is that Mr. Vaino's
18 firing was fake and obviously the defense disputes that. So
19 I think it is entirely appropriate for it to come in.

20 Again, not as for the truth of the matter asserted
21 but under the relevance of --

22 THE COURT: What if we just committed the top
23 e-mail, wouldn't that have the same effect?

24 MS. DENERSTEIN: I am sorry, meaning what?

25 THE COURT: That Mr. Shkreli is enclosing and

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1 sending to Mr. Vaino and Mr. Greebel the Vaino executed
2 self-evident agreement. Just the top e-mail.

3 MR. KESSLER: I think frankly, Your Honor --

4 THE COURT: Forget all the other stuff that is
5 from Martin to his sister and Michael Smith. Mr. Greebel is
6 not on it.

7 And then his sister forwards it to Mr. Shkreli and
8 Mr. Smith. Mr. Greebel is not even in the second and third
9 e-mail, and you would admit the first e-mail, which is the
10 one that Mr. Greebel is copied and he has given an executed
11 self-evident agreement with Mr. Vaino.

12 MR. KESSLER: Okay.

13 THE COURT: Doesn't that achieve what you want?

14 MS. DENERSTEIN: Well, that is acceptable to the
15 defense.

16 MR. KESSLER: That is okay. And then just two
17 flags for the parties. I think we will have a few documents
18 also related to Mr. Vaino in this time period that we will
19 offer either on cross or rebuttal, and we will try to talk
20 them through with defense first. But under the
21 understanding that all these hearsay communications about
22 Mr. Vaino are coming in to some extent. We may have some to
23 offer.

24 THE COURT: All right. So 1010 will be admitted
25 as exception.

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1 (Government's Exhibit Number 1010 so marked and
2 received in evidence.)

3 MR. KESSLER: And then 1317.

4 THE COURT: Okay.

5 MR. KESSLER: So this is -- did I skip something?

6 MS. DENERSTEIN: One second.

7 (Pause in proceedings.)

8 MS. DENERSTEIN: One second, Your Honor. Sorry.

9 MR. KESSLER: We have multiple lists that we are
10 all trying to --

11 MS. DENERSTEIN: We are trying to narrow it.

12 MR. KESSLER: -- all be on the same page.

13 THE COURT: I've got so many copies floating
14 around.

15 MS. DENERSTEIN: So we are skipping it?

16 MR. KESSLER: All right. We are skipping 1317.

17 MS. DENERSTEIN: Narrow the list even more.

18 MR. KESSLER: And then I think the last one is
19 1307 which is actually much more focused -- in the binder.

20 THE COURT: So you're skipping 1317?

21 MR. KESSLER: No. Skipping in the sense that the
22 defense is not offering it.

23 THE COURT: Okay.

24 MR. KESSLER: So there is no need to discuss it.

25 THE COURT: Okay. So now we are going to

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1 Defendant's 1307.

2 MR. KESSLER: That is correct. And that is
3 actually ahead of -- it is right --

4 (Pause in proceedings.)

5 MS. DENERSTEIN: I don't have that.

6 MR. KESSLER: It is behind Tab E.

7 MS. DENERSTEIN: Your Honor, we can just hand you
8 up one.

9 THE COURT: I have to it. Okay.

10 MR. KESSLER: So, Your Honor, this is an e-mail
11 from Mr. Greebel to Clifford Brandeis, B-R-A-N-D-E-I-S.
12 Mr. Brandeis is Mr. Kevin Mulleady's lawyer in a
13 litigation -- this is the prelitigation stage, I think.
14 Mr. Brandeis is Mr. Mulleady's lawyer, and ultimately
15 Mr. Mulleady engages in all sorts of settlement agreements
16 with the company. There are drafts with the plaintiff
17 circulated. There is a whole sort of sideshow related to
18 Mr. Mulleady's litigation. So that is my first objection.

19 But the second and more fundamental objection,
20 this email is entirely hearsay. We are accounting
21 Mr. Greebel's conversations with Mr. Mulleady, what
22 Mr. Mulleady was doing, what Retrophin proposes to do. Who
23 can access whose computer.

24 THE COURT: So is this representation about
25 Retrophin asking him to do this or Retrophin wanting him to

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1 do that?

2 MS. DENERSTEIN: So --

3 THE COURT: Is that --

4 MS. DENERSTEIN: I am sorry.

5 THE COURT: Is that Retrophin itself, the other
6 Board or is it Mr. Shkreli?

7 MR. KESSLER: Nothing in the record one way or
8 another.

9 MS. DENERSTEIN: Your Honor, I think this is
10 Mr. Greebel calling Mr. Brandeis, I mean writing to
11 Mr. Brandeis and it reflects Mr. Greebel's understanding of
12 the share. And again, it is not necessarily offered for
13 truth, but as Your Honor knows, Mr. Mulleady is alleged to
14 be a co-conspirator on Count 8. And here Mr. Greebel is
15 saying -- it is not offered for the truth, it goes to
16 Mr. Greebel's state of mind that his understanding is that
17 he would surrender claims to receive additional shares of
18 Fearnow and Retrophin will facilitate those shares. I think
19 we can redact the other -- I don't think the second
20 sentence, Also understand the company -- we would be happy
21 to redact that sentence.

22 But I do think that this is important to show that
23 Mr. Greebel's state of mind and his understanding. Again,
24 not offered for the truth.

25 MR. KESSLER: The problem is, this is recounting

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1 conversations and various facts. It is going to be taken as
2 true.

3 MS. DENERSTEIN: I think an instruction and given
4 all the other documents that we can cure that.

5 MR. KESSLER: But I think this is exactly the kind
6 of document that cannot be cured by that.

7 THE COURT: What if we redacted all those
8 sentences from the first paragraph except the last sentence?

9 MR. KESSLER: So that is just a request --

10 THE COURT: Uh-huh.

11 MR. KESSLER: -- in other words?

12 THE COURT: Then all the hearsay is out because
13 what the e-mail describes is conversation with Mr. Mulleady.
14 Does that work?

15 MS. DENERSTEIN: It works.

16 MR. KESSLER: Yes. That is fine.

17 MS. DENERSTEIN: We are done.

18 MR. KESSLER: I think that is it.

19 MS. DENERSTEIN: Yeah.

20 THE COURT: Just a second. Then the second
21 paragraph also reflecting an understanding that Mr. Greebel
22 has from somebody.

23 MR. KESSLER: I think the defense agreed to redact
24 that.

25 MS. DENERSTEIN: Yes. We will redact that.

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1 THE COURT: Okay. The second paragraph is coming
2 out?

3 MS. DENERSTEIN: Yes.

4 THE COURT: That is it.

5 MR. KESSLER: I think we should redact the if you
6 have any questions. We can leave if you have any questions,
7 but if you would like to discuss the assignment of stock or
8 the computer issue, the reference to the computer issue
9 is no longer going to make sense because we have taken out
10 the computer issue.

11 MS. DENERSTEIN: I think we can redact the
12 computer issue but the remainder should just remain because
13 it is basically if you have --

14 THE COURT: So it will read what, please.

15 MS. DENERSTEIN: If you have any questions or
16 would like to discuss either the assignment of stock, please
17 call me at (212) 940-6383 and we would redact or the
18 computer issue.

19 THE COURT: All right. What about also either
20 just because it does not make sense grammatically.

21 MR. KESSLER: Yeah.

22 MS. DENERSTEIN: Of course. It is nice to be
23 grammatically correct.

24 MR. KESSLER: And, Your Honor, just so the Court
25 understands where we are, I think Mr. Dooley has some time

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1 left.

2 MS. DENERSTEIN: Maybe an hour.

3 MR. KESSLER: And then we intend to do a
4 cross-examination of Mr. Dooley. I do not think that will
5 be long.

6 I also think it is possible that any documents we
7 would want to admit as either a part of the cross or as a
8 potential rebuttal could be admitted through Mr. Dooley. We
9 are going to try to figure that out. If, in fact, the
10 defense rests and, in fact, we do want to put on a brief
11 rebuttal case, it would at this point be to admit a few
12 documents and we will have a witness ready to go at any
13 point this afternoon to do that. So we'll try to avoid that
14 if we can, but...

15 MS. DENERSTEIN: Your Honor, as I said last Friday
16 when we were here and quite productive, it would be really
17 helpful if it is six or eight documents, at this point
18 the Government has had what we intend to admit for quite
19 some time and I don't imagine that this is -- I cannot
20 imagine that they are just figuring this out right now. So
21 I think the sooner they could share the documents with us.
22 I know this jury has been so patient with all of us and we
23 would like to just get this done quickly and I don't want to
24 have a huge sidebar at the break if we can just look at them
25 and figure it out.

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1 MR. KESSLER: We will work it out.

2 MS. DENERSTEIN: But that was also on Friday what
3 was said.

4 THE COURT: Yeah, give it to them if you can,
5 please.

6 Are we prepared to sit next week? I don't know
7 whether the jurors will be but...

8 MR. KESSLER: I think if -- permit my pause. If
9 the jurors were deliberating next week we would have some
10 accommodation of people who could be hear and address notes.
11 You know, I think there is obviously a bigger question about
12 the jurors' schedules and that thing, but I think maybe that
13 is something we should address at end of the day.

14 THE COURT: Yeah. I think at some point we are
15 going have to talk to the jurors depending on where we are
16 in our timing. I don't want the jurors to feel rushed in
17 their deliberations but, you know, whether we are going to
18 end up losing everybody next week and having a mistrial or
19 whether they are willing to come back week after next. I
20 don't know what the situation will be. But I feel very
21 uncomfortable about where we are right now given how long
22 this is going on and I just want to make sure that the
23 jurors have plenty of time to deliberate. So you should
24 maybe talk about this and figure out what we are going to
25 tell the jurors at the end of the week.

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1 MR. KESSLER: I think everyone shares the same
2 concern and so we will try to figure out a unified stance on
3 what we should be telling the jurors and whatnot.

4 THE COURT: Okay. Thank you. I'll see you very
5 shortly.

6 (Lunch recess taken at 1:21 p.m.)
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1 A F T E R N O O N S E S S I O N

2 (In open court; outside the presence of the jury at
3 1:53 p.m.)

4 THE COURT: We hope to post up the third version of
5 the charges and the verdict sheet within the hour or less.
6 And that will give you plenty of time to prepare for the
7 closings, which may start as soon as tomorrow.

8 MR. DUBIN: Will the updated version have the
9 Court's ruling on the withdrawal of Count Seven?

10 THE COURT: Yes.

11 MR. DUBIN: Okay.

12 THE COURT: Withdrawal of the backdating scheme.
13 Yes, we didn't use the term backdating scheme because we
14 looked through the transcripts and didn't see any specific
15 reference to it, it wasn't called that. So we just used the
16 descriptor, the descriptive language. And Mr. Tata will send
17 the parties a black line so you can see what the changes are.

18 MR. DUBIN: Thank you, your Honor.

19 MR. PITLUCK: Judge, just in terms of scheduling and
20 notification, we had a chance to confer and I think based on
21 our reasonable interpretation of schedule and timing going
22 forward we think it's likely that the jury will be charged by
23 Thursday afternoon; I'm looking at Mr. Dubin for confirmation.

24 Obviously things can change, your Honor, but that's
25 what we mutually think is foreseeable, what we're all working

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1 towards, including likely starting summations tomorrow
2 morning.

3 Given that, we would like to, as the Court
4 indicated, tell the jury that there is the, at least the
5 possibility, that they will have the case and their
6 deliberations may extend into the following week. We would
7 like to carefully come up with language that says that they
8 can, but don't have to, or that they can but they don't have
9 to, resolve it before of Christmas, but they can deliberate
10 the next week. And then suggest that we are planning on
11 sitting the week starting after Christmas on the 26th, that
12 week. Obviously, Judge, if anybody has conflicts we don't
13 want to lose the jury because someone says I'm traveling the
14 26th, 27th. We can amalgamate that and see what the
15 likelihood is to get the jury in for a few days, two days or
16 all four days next week. We had a pretty solid jury, we
17 haven't lost many people recently. We're now talking about
18 the week after Christmas.

19 I think obviously if nobody is available our
20 preference at least would be have them come back the second
21 rather than lose the entire jury and have to do this all over
22 again. I think we need to know. It's better to notify them
23 today that that's a possibility.

24 THE COURT: All right. I have a plea that the
25 parties want to do before me on Thursday, a two-hour plea, and

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1 some of the parties and lawyers are coming from abroad. We're
2 trying very hard to move it, Ms. Jackson will do her best.

3 MR. PITLUCK: The afternoon on Thursday?

4 THE COURT: I believe so.

5 MR. PITLUCK: There is a possibility they may be
6 charged and deliberating on Thursday.

7 THE COURT: If there is an hour-and-a-half plea, and
8 there is a note from the jury, it's hard to interrupt a plea
9 and it's hard to keep the jury waiting with a response.

10 We're trying to push it off until hopefully
11 mid-January when this case will be over.

12 MR. PITLUCK: So that's our thought on scheduling
13 and informing the jury.

14 THE COURT: Would you rather wait until the end of
15 the day or did you want to come up with language, or what do
16 you want to do?

17 MR. PITLUCK: I think it probably makes sense to
18 wait until the end of the day. If there is something that
19 comes up, there is an outstanding issue, that would throw that
20 timing off.

21 MR. DUBIN: We're in agreement with the Government
22 on this and we'll work together to come up with language, your
23 Honor.

24 THE COURT: We have a continuing resolution that
25 expires this Friday, same issues. We're hoping it will be

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1 extended through January 19, but we've just been given notice
2 of the possibility. We don't plan to shut down in any event.

3 Was the defense offering Defense Exhibit 3A and
4 Defense Exhibit 110-47?

5 MS. DENERSTEIN: The consulting one, I don't think
6 so.

7 THE COURT: 110-47 looks like --

8 MS. DENERSTEIN: Yes.

9 THE COURT: Any issue on this one?

10 MR. KESSLER: Just the same.

11 MS. DENERSTEIN: That one is --

12 MR. KESSLER: That one, I actually -- is a chart.

13 THE COURT: 110-47, so it will be admitted without
14 objection.

15 You'll formally offer it?

16 MS. DENERSTEIN: Yes. Do you want us to get
17 Mr. Dooley?

18 THE COURT: Yes, please.

19 (Whereupon, the witness resumes the stand.)

20 (Jury enters the courtroom at 2:03 p.m.)

21 THE COURT: All jurors are present. Have a seat.

22 You may resume your direct.

23 DIRECT EXAMINATION

24 BY MS. DENERSTEIN:

25 Q Mr. Dooley, do you have Defense Exhibit 6B --

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1 A I do.

2 Q -- for identification.

3 MS. DENERSTEIN: Your Honor, at this time the
4 defense would offer Defense Exhibit 6B as a demonstrative aid
5 subject to your Honor's prior ruling.

6 MR. KESSLER: No objection to that.

7 THE COURT: All right. We will allow Defense
8 Exhibit 6B to be published to the jury as a demonstrative
9 exhibit.

10 (Defense Exhibit Number 6B so marked and received in
11 evidence for demonstrative purposes only.)

12 BY MS. DENERSTEIN:

13 Q Mr. Dooley, can you explain what this is?

14 A It's a chart similar to the other charts that we've
15 discussed. This chart is focused on the disclosure of
16 settlement agreements in various SEC filings.

17 Q So can you take us across the first row, for example?

18 A Sure. The exhibit number of the particular document, the
19 date of the document, the description of the document, where
20 within the document the settlement agreement is disclosed.

21 Q Over what period of time does this cover?

22 A September 2013 through March 2014.

23 Q How many times were there disclosures about settlement
24 agreements based on this document?

25 A In eight documents, and I believe it was 27 times in

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1 various eight documents. Twenty-nine, if I did my math right
2 -- 27.

3 Q Okay. Let's turn to Government's Exhibit 968, walk
4 through one or two examples, then move on.

5 So turning to Government's Exhibit 968, which in
6 binder two.

7 A Yes.

8 Q What is the first page?

9 A It's a form 10K-A amendment number one for Retrophin Inc.
10 For the transition period March 1, 2012, through December 31,
11 2012.

12 Q Is that captured in the first three columns of this chart
13 in row one?

14 A In row one of the chart, Exhibit GX968, is the first line
15 on the chart.

16 Q So then turning to settlement agreement disclosure, can
17 we go to the section liquidity and capital resources, page
18 seven of 39, go down to in the second quarter. Is this
19 language similar to language you read previously?

20 A Yes, it is.

21 Q Now, Mr. Carter, could we go to note two, liquidity and
22 financial condition and management's plans, page 24 of 39, and
23 go down in the second quarter. Again, is this language
24 similar to language you've previously read to the jury?

25 A Yes, it is.

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1 Q Mr. Carter could we turn to three, note 12, subsequent
2 events page 39 of 39, it's the top paragraph. This language
3 similar to language you previously read disclosing settlement
4 agreement?

5 A Yes, it is.

6 Q And so let's go to the next column, on Defense Exhibit
7 6B, so it states Defense Exhibit 116-80?

8 A Yes.

9 Q What date?

10 A September 13, 2013.

11 Q What form?

12 A Form 10Q amendment number one for Retrophin Inc. For the
13 period March, quarterly period March 31, 2013.

14 Q Can you please read the box completed under settlement
15 disclosure?

16 A Liquidity and capital resources, page 30 of 36. Note
17 three, liquidity financial condition and management plan, page
18 12 of 36.

19 Q Is that where there would be language about settlement
20 disclosures?

21 A Yes.

22 Q Referring to Defense Exhibit 116-81, what is the date?

23 A September 13, 2013.

24 Q What is the description?

25 A Form 10Q Retrophin Inc. For the quarterly period June 30,

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1 2013.

2 Q Referring to the final column, in places where there is
3 1, 2, 3 does that describe locations within the document where
4 settlement agreements were disclosed?

5 A Yes.

6 Q Go to the next column please, with respect to Defense
7 Exhibit 8432, what date is that filed?

8 A September 13, 2013.

9 Q What is the description?

10 A It's the Form S1 amended for Retrophin Inc. Registration
11 statement with the SEC.

12 Q In the fourth column, where there are numbers one through
13 four, is that places where the settlement agreements with
14 disclosed?

15 A Yes.

16 Q And on, or there is reference to them, with respect to
17 the next column -- next row GX972?

18 A That I might need some help finding, counsel.

19 Q In binder three.

20 A Got it.

21 Q Just referring to Defense Exhibit 6B --

22 A Yes.

23 Q -- the chart. What is the date of the exhibit
24 Government's Exhibit 972?

25 A November 12, 2013.

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1 Q The description?

2 A Form 10Q for Retrophin Inc. For the quarterly ended
3 September 30, 2013.

4 Q And again, are the numbers one, two, three in the fourth
5 column, do they refer to settlement disclosures?

6 A They do.

7 Q And again, if we keep going through this chart
8 Government's Exhibit 978, Defense Exhibit 116-52 and Defense
9 Exhibit 116-102, are these also forms that were filed with the
10 SEC?

11 A They are.

12 Q If you go to the fourth column do they also have numbers
13 and pages stating where disclosure about settlement agreements
14 would occur?

15 A Correct.

16 Q Let's turn back to binder three -- I meant binder two.
17 If we could turn to Defense Exhibit 1285, is this an e-mail
18 between Evan Greebel and Martin Shkreli on March 14, 2013, and
19 the subject is S1?

20 A I'm not there yet.

21 Q Sorry. In the front of binder three -- I'm sorry, I said
22 two, I meant three.

23 A Yes.

24 Q Is this an e-mail between Evan Greebel and Martin Shkreli
25 on March 14, 2013 regarding the S1?

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1 A Yes, it is.

2 Q Can you read the text please?

3 A "As discussed, the S1 is done. I just reviewed the
4 rights agreement if the S1 is not filed by tomorrow we will
5 owe the investors 2 percent of the amount raised for every 30
6 days that it is late with a cap. And such amount is prorated
7 if filed within the 30-day period. In addition, if the S1 is
8 not declared effective within four months of the pipe closing,
9 then the warrant may be cashless exercised i.e. the warrant
10 holders do not have to pay the company more money to invest
11 rather they will receive less shares."

12 Q Can we turn to Defense Exhibit 1289, can we go to the
13 bottom of the page, to the first e-mail. Is this an e-mail
14 from Evan Greebel on July 31, 2013, to Martin Shkreli and Marc
15 Panoff and the subject is Mike Smith employment agreement?

16 A It is.

17 Q What does the e-mail state?

18 A "Attached is the draft of Mike Smith's employment
19 agreement."

20 Q Can we go to the next, is this another is this an e-mail
21 from Evan Greebel to Martin Shkreli on August 13, 2013?

22 A It is.

23 Q And what does it state?

24 A "FYI, as discussed the option portion needs to be
25 approved by the Board," BD.

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1 Q Can we go to the next e-mail please. Is this an e-mail
2 from Martin Shkreli to Steve Richardson, Steve Aselage,
3 copying Evan Greebel dated August 13, with the subject line
4 forward Mike Smith employment agreement?

5 A It is.

6 Q What does that state?

7 A "I wanted to offer options to one of my hardest working
8 guys, Michael Smith. He has been at Retrophin for one year
9 and is one of the most loyal, hard-working people I've met.
10 Please let me know if you agree."

11 Q Can you go to the next e-mail in the chain, from Steve
12 Richardson to Martin@R?

13 (Continued on the next page.)
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1 Q And what is the date?

2 A January 17th, '13.

3 Q And what does the first paragraph state?

4 A Retrophin NASDAQ RTRX is a thinly covered
5 pharmaceutical company that carries, in my opinion,
6 tremendous upside potential.

7 Q And what does the next sentence state?

8 A The company has four drugs in the pipeline with one
9 RE-021 being in Phase 2 trials.

10 Q And what does the third paragraph first sentence state?
11 Just give Mr. Carter one minute to catch up.

12 A Retrophin was founded by a businessman with a history
13 in markets that has a passion for Pharma, has followed it
14 for years and over those years has come to understand how
15 the science of big Pharma works as well as the business
16 itself.

17 Q Let's then go to the last paragraph. Can you please
18 read that?

19 A It was only a matter of time before Shkreli was
20 managing his own hedge funds under MSMB, a company founded
21 by Shkreli and his partner Martin Biestek --

22 Q Marek Biestek?

23 A Excuse me, Marek Biestek. Marek Biestek from the roots
24 of MSMB came what equated to a potential with the
25 development of a drug RE-021 that would be the basis for the

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1 creation of Retrophin. Shkreli formed Retrophin and to this
2 day owns half of the shares of the company. That is another
3 important factor as investors considered this company.

4 Q Can we turn to Defense Exhibit 1071.

5 Is this also from Seeking Alpha?

6 A Yes, it is.

7 Q And what is the title?

8 A Retrophin, a new player in the orphan and ultra-orphan
9 drug spaces.

10 Q And what is the date?

11 A August 25th, '13.

12 Q And can you read the first sentence?

13 A Biotech companies developing and marketing orphan and
14 ultra-orphan drugs have done exceptionally well in 2013 and
15 in recent years.

16 Q Can we go to the next paragraph?

17 A One company on few investor's radar is Retrophin NASDAQ
18 RTRX developing an ultra-orphan drug for disease known as
19 PKAN, P-K-A-N, Patothenate kinase-associated
20 neurodegeneration.

21 Q That's greet.

22 Let's go to Exhibit 1072.

23 What publication is this?

24 A Forbes.

25 Q And what is the date?

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1 A December 12, 2013.

2 Q And what is the title?

3 A Can the trust hormone make it as a treatment for
4 schizophrenia and autism.

5 Q And what does the first sentence state in the article?

6 A Martin Shkreli, the 30-year-old hedge fund manager
7 turned biotech CEO, is curled up in a chair in his 22nd
8 floor Manhattan offices looking like a teenager with his
9 shaggy hair, red Polo and bright blue sweater cardigan.

10 Q Can we turn to the second page of 207. Going to that
11 first paragraph in the middle where it says, This morning?

12 A Yes.

13 MS. DENERSTEIN: Can you pull that up.

14 Q Can you read that, please?

15 A This morning Shkreli's company Retrophin is announcing
16 that it has purchased the U.S. rights of the drug known by
17 the brand name of Syntocinon from Novartis for \$5 million
18 plus a 20 percent royalty.

19 Q And can you go to the next paragraph, read the first
20 couple sentences, please.

21 A That is not the big opportunity Shkreli is eyeing,
22 though. He plans to test the nose spray Oxytocin as a
23 schizophrenia drug. Retrophin is also announcing a
24 100-patient clinical trial testing Syntocinon in the
25 psychiatric disorder and in autism where small studies have

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1 also shown a glimmer of hope that might be helpful.

2 Q Can we turn to Page 5 of 7 to It's easy to admire. Can
3 you read the sentence, please.

4 A It's easy to admire Shkreli's courage in pushing into
5 psychiatry in an area that most drug companies are
6 abandoning.

7 Q And the next sentence.

8 A If you're really smart you're doubling down the central
9 nervous system disorders, he says.

10 Q And the next sentence, please.

11 A And he is right that Syntocinon deserves to be tested
12 in schizophrenia and autism.

13 Q Okay. Let's turn to Defense Exhibit 13056. What is
14 the date?

15 A February 21, 2012.

16 Q Is this a press release?

17 A It is.

18 Q For Retrophin?

19 A Yes.

20 Q And the title states Ligand Licenses DARA Program to
21 Retrophin?

22 A It does.

23 Q And what does the first sentence state?

24 A Ligand Pharmaceuticals, Incorporated and Retrophin,
25 LLC, announced that the companies have entered into an

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1 agreement in which Ligand has licensed rights to DARA (a
2 Dual Acting Receptor Antagonist of Angiotensin and
3 Endothelin receptors to Retrophin.

4 MS. DENERSTEIN: And can we go to the bottom of
5 this document where it says about Retrophin and can we
6 highlight that.

7 Q And can we read the last sentence of the this
8 paragraph?

9 A Retrophin's Series A financing was led by MSMB Capital
10 and several current and former senior executives at Global
11 Pharmaceutical and Healthcare companies.

12 MS. DENERSTEIN: Can we turn to Defense
13 Exhibit 1055.

14 Can we go to the bottom of the exhibit, please.
15 There you go. Thank you, Mr. Carter.

16 Q Is this an e-mail from Mr. Greebel sent on
17 September 20th, 2012 to Martin Shkreli?

18 A It is.

19 Q Who is copied?

20 A David Kravitz.

21 Q What is the subject?

22 A Capitalization tables.

23 MS. DENERSTEIN: And can we go to the bottom
24 e-mail.

25 Q Can you read the text of the e-mail.

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1 A As -- as discussed, attached are two cap tables, one
2 showing the capitalization of LLC as of today and the other
3 showing the capitalization of Inc., immediately following
4 the conversion. The Inc., cap table assumed that Class A
5 common is converted to 1 to 1. Class B common is converted
6 according to the formula that we discussed and Series A
7 Preferred is converted 1 to 1.

8 Q Can we read the next sentence, please.

9 A Immediately following the conversion you will own
10 47.63 percent of the outstanding equity. (It does not
11 include the 98,000 that has not vested). You will -- you
12 along with MSMB Health will own 53.55 percent of the
13 outstanding equity. (Does not include the 98K that has not
14 vested). Please confirm in writing.

15 Q Wait just a second.

16 MS. DENERSTEIN: Mr. Carter, can you highlight the
17 last sentence.

18 Q Can you read that, Mr. Dooley?

19 A Please confirm in writing that these numbers/cap tables
20 are correct.

21 MS. DENERSTEIN: Can you go to the response?

22 Q What does Martin Shkreli respond?

23 A This looks good to me.

24 MS. DENERSTEIN: Can we go to next e-mail in the
25 chain.

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1 Q What does Mr. Greebel ask?

2 A Are the numbers accurate and accurately reflect your
3 movements and internal records?

4 Q And what does Mr. Shkreli respond?

5 A Substantially so, yes.

6 Q And is Mr. Kravitz copied on this e-mail?

7 A He is.

8 Q And is the date September 20, 2012?

9 A Yes, it is.

10 Q Okay.

11 Now, I would like to show you the Defense
12 Exhibit 110-47 for identification.

13 And you should be looking at
14 Government's Exhibit 111-26. Ready?

15 A Yes.

16 Q Is Defense Exhibit 110-47 a fair and accurate summary
17 of Government's Exhibit 111-26?

18 A It is.

19 MS. DENERSTEIN: Your Honor, at this time the
20 defense offers Defense Exhibit 110-47 in evidence.

21 MR. KESSLER: No objection.

22 THE COURT: We will in evidence Defense
23 Exhibit 110-47.

24 (Defendant's Exhibit Number 110-47 so marked and
25 received in evidence.)

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1 Q Can we first go to Government's Exhibit 111-26?

2 A Yes.

3 Q And is this an e-mail from Jackson Su on December 3rd
4 to Susan Chew copying Corey Massella?

5 A Yes.

6 Q And is the subject share transfer documents?

7 A It is.

8 Q And can you read the text?

9 A Attached - more share transfers. Kevin Mulleady to
10 Martin Shkreli; Tom Fernandez to Martin Shkreli; Martin
11 Shkreli to MSMB Healthcare; Marek Biestek to Martin Shkreli,
12 I think you have this already.

13 Q And is this from Jackson Su?

14 A It is.

15 Q And are there attachments?

16 A There are.

17 Q And what are the attachments briefly?

18 A Transfer and donee representation letters.

19 Q Okay. And going to the chart, back to DX 110-47, can
20 you explain the top row?

21 A Sure. Who transferred the shares, the number of units,
22 the type of share, and who received the shares.

23 Q So turning to the first column, can you explain that?

24 A Sure. Marek Biestek transferred 4,167 units Class B
25 shares to Martin Shkreli.

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1 Q You just read that whole row across?

2 A Yes.

3 Q And is that from document Bates Number 12850?

4 A Yes, it is.

5 Q And turning back in the chart, the second row, so back
6 to Defense Exhibit 110-47. Can you read that row?

7 A Sure. Kevin Mulleady transferred 10,000 Class B shares
8 to Martin Shkreli.

9 Q And if you add the units together, what are the total
10 number of Class B units that were transferred to Shkreli?

11 A 14,167 shares -- units.

12 Q Going to the next row, can you explain that to the
13 jury?

14 A Sure. Mr. Shkreli transferred 75,000 Class B units to
15 MSMB Capital.

16 Q And what is the total Class B units to MSMB Capital?

17 A 75,000 units.

18 Q And going to the next category. Who is the transfer,
19 if you go through these rows, please.

20 A Sure. There was a transfer, a voided transfer and then
21 another -- a successful transfer. Excuse me. There's a
22 transfer from Mr. Fernandez to Mr. Shkreli 50,000 Class A
23 shares.

24 Q And what does the voided transfer reflect?

25 A It was initiated and then canceled.

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1 Q And going to the total of Class A units to Shkreli?

2 A 80,000.

3 Q And did the information for this chart come from
4 Government's Exhibit 111-26?

5 A Yes.

6 Q I'm going to --

7 MS. DENERSTEIN: Your Honor, could I just have one
8 second?

9 THE COURT: Yes.

10 (Pause in proceedings.)

11 Q I would like you to turn Defendant's Exhibit 1327. Is
12 this from Andrew Vaino sent Sunday, December 30, 2012, to
13 Jackson Su?

14 A Yes, it is.

15 Q And is Martin Shkreli and Michael Smith copied?

16 A Yes, they are.

17 Q And what is the subject?

18 A Retrophin's/MSMB Capital e-mail accounts.

19 Q Is Evan Greebel on this e-mail?

20 A He is not.

21 Q Can you read what the text states.

22 A Jackson, would you please ensure that any possible
23 access to these accounts from any of my devices is disabled.
24 (I assume this can be done by resetting the password).

25 Going forward I can be reached by e-mail at this

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1 address. As always, please ensure that no nonpublic
2 information regarding Retrophin or MSMB is sent to me.

3 Thanks, Andy.

4 Q Can we turn to Defendant's Exhibit 1328.

5 And is this an e-mail from Mark Taylor to Andy
6 Vaino?

7 A Yes, it is.

8 Q And what date is it sent?

9 A February 7th, 2013.

10 Q Okay.

11 MS. DENERSTEIN: Can we go to the bottom e-mail
12 first.

13 Q And is that an e-mail from Andy Vaino?

14 A Yes.

15 Q And what does he state?

16 A Hi, Mark, I hope all is well. I am seeking a new
17 position as a biotech analyst. Do you know anyone at
18 Tamarack Capital? I note that they are one of a very small
19 number of health care funds in San Diego. Cheers, Andy.

20 Q And what does Mr. Taylor respond February 27, 2013?

21 A I know Justin. Try him. Good guy, very smart.
22 Realized they like revenue. Mark Taylor.

23 MS. DENERSTEIN: Can we turn to Defendant's
24 Exhibit 6239.

25 Go to the bottom e-mail first.

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1 Q Is this an e-mail from Martin Shkreli to Andy Vaino on
2 March 6, 2013?

3 A It is.

4 Q And is the subject formalized EA?

5 A Yes.

6 Q Could you please read the e-mail.

7 A You will get 100K upfront. Please let me know if you
8 want taxes taken out. You will forego the escrowed Fearnow
9 shares. You will receive a handsome stock option or RSU
10 grant. Okay. Am I missing anything?

11 Q And what does Mr. Vaino respond?

12 A Please do take taxes out. Everything else on. Should
13 probably specify San Diego as California area. It's
14 currently blank.

15 Q And is this on March 7th?

16 A Yes it is.

17 Q And is Mr. Greebel on this e-mail?

18 A He is not.

19 Q Turning to Defense Exhibit 1901. Can you read the top,
20 please.

21 A It is an e-mail from Jackson Su to Martin Shkreli on
22 November 12, 2012, with the subject line e-mailing form
23 donee rep letter SA.

24 Q And is there an attachment?

25 A There is.

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1 Q And what does the body of the e-mail say, the text?

2 A Form donee rep letter SA.

3 Q Can you read the text underneath in the e-mail?

4 A Your message is ready to be sent with the following
5 file or link attachments, form donee rep letter SA.

6 Q And if you turn to the next page, what is the header of
7 this document?

8 A Retrophin, LLC, transfer and donee representation
9 letter.

10 Q And can you read the first pass, first part of this
11 sentence until 50,000?

12 A For value received Martin Shkreli, the transferor does
13 hereby grant, sell, assign, transfer and convey unto Stephen
14 Aselage the transferee, its successors and assigns all of
15 its right, title, and interest to 50,000.

16 Q And is the last part Class B common units?

17 A Yes.

18 Q Of Retrophin, LLC?

19 A Yes.

20 Q And going back to the first page of the Defense
21 Exhibit 1901.

22 A Yes.

23 Q Is Evan Greebel on this e-mail?

24 A No, he is not.

25 Q Turning to Defense Exhibit 1307 which I think you are

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1 going to have to look at on the computer.

2 A All right.

3 Q Is this an e-mail from Evan Greebel?

4 A It is.

5 Q What date?

6 A March 14th, 2013.

7 Q To who?

8 A Clifford Brandeis.

9 Q What is the subject?

10 A Kevin Mulleady.

11 Q And can you read what the e-mail states?

12 A Mr. Brandeis, to clarify, Retrophin would like Kevin to
13 surrender any claims that he has to receive additional
14 shares from Troy Fearnow and Retrophin will facilitate such
15 shares being transferred to certain investors in Retrophin.
16 CHECK ON.

17 Q And can you please read the next sentence?

18 A If you have any questions, would like to discussion the
19 assignment of stock, please call me at... Best regards,
20 Evan.

21 Q And there is a phone number after please call me at,
22 correct?

23 A (212) 940-6383.

24 Q Can we turn to --

25 THE COURT: Did you want were you wanted to admit

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1 this?

2 MS. DENERSTEIN: Yes, Your Honor.

3 THE COURT: Okay. We have just been going through
4 a lot of exhibits I am not sure. We have not been admitting
5 a lot of exhibits. I am assuming they are in unless you are
6 moving them in. This one I know is not in.

7 MS. DENERSTEIN: Yeah. I can clean that up.

8 THE COURT: Well, some of these with being
9 admitted for certain purposes.

10 MS. DENERSTEIN: Right. And pursuant to our
11 discussion, Mr. Kessler was going to let you know he had
12 wanted these particular.

13 THE COURT: Well, so would you advise the jury if
14 we are going to admit them for one purpose or not just so
15 the record is clear and the jury understands.

16 MS. DENERSTEIN: So --

17 THE COURT: Let's just start with 1307 since that
18 is where we are right now. Do you want to offer them?

19 MS. DENERSTEIN: Yes. At this point the defense
20 would offer Defense Exhibit 1307 into evidence.

21 MR. KESSLER: No objection subject to our
22 discussion.

23 THE COURT: All right. So the jury is instructed
24 that Defense Exhibit 1507 is admitted not for the truth.

25 MS. DENERSTEIN: Your Honor, I think we are going

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1 to be moving for admission Defense Exhibit 1307, 104-99,
2 5458, 1283, 1306, 1315, 1010 and 1309 into evidence pursuant
3 to our conversation with Your Honor at lunch.

4 MR. PITLUCK: No objection subject to that.

5 THE COURT: I just wanted to clarify something
6 about many of these exhibits are not being offered for the
7 truth. So I am going to read in the ones that I understand
8 that would be the case. There are some where I do not think
9 it was entirely clear whether the Government is consenting
10 to have exhibits offered as long as it is not for the truth.

11 So Defense Exhibit 104-99 is admitted but not
12 offered for the truth.

13 (Defense Exhibit Number 104-99 so marked and
14 received in evidence.)

15 THE COURT: Defense Exhibit 1283 is admitted under
16 the same condition.

17 (Defense Exhibit Number 1283 so marked and
18 received in evidence.)

19 THE COURT: Defense Exhibit 1315 is admitted but
20 not offered for the truth.

21 (Defense Exhibit Number 1315 so marked and
22 received in evidence.)

23 THE COURT: And the others we made different
24 rulings, but have I overlooked any of those exhibits?

25 MR. KESSLER: I do not believe so.

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1 THE COURT: All right. So we will then otherwise
2 admit Defense Exhibit 5458 as discussed at sidebar.

3 And Defense Exhibit 1306.

4 And 1309.

5 And Defense Exhibit the 1307 is admitted but not
6 for the truth.

7 MS. DENERSTEIN: Okay. We were on Defense
8 Exhibit 1307.

9 Could we just blow up the text again.

10 Q And, Mr. Dooley, could you just reread this exhibit?

11 A Mr. Brandeis to clarify, Retrophin would like Kevin to
12 surrender any claims that he has to receive additional
13 shares from Troy Fearnow and Retrophin will facilitate such
14 shares being transferred to certain investors in Retrophin.
15 If you have any questions or would like to discuss the
16 assignment of stock, please call me at (212) 940-6383. Best
17 regards, Evan.

18 Q Okay.

19 MS. DENERSTEIN: Can we turn to Defense
20 Exhibit 1902. And can we go to the second e-mail.

21 Q And is this an e-mail from Evan Greebel on Monday,
22 March 25, 2013, to Lenora Izerne?

23 A It is.

24 Q And is the subject assignment?

25 A Yes, it is.

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1 Q And can we go to the text of the e-mail.

2 A Hi, Nora, I hope you had a good weekend. If you have a
3 moment, please ask Linda for a copy of the executed lease
4 and we will prepare the assignment.

5 Also in the future, please do not refer to
6 Retrophin and MSMB Capital as the same personnel or the same
7 company. But there are significant legal implications which
8 we want to avoid. I'm happy to discuss if you have any
9 questions. Evan.

10 Q And is there a response from Ms. Izerne?

11 A There is.

12 Q And can you read the first couple of sentences.

13 A Hi, Evan, Hope all is well. Okay, got it. And thank
14 you for clarifying since you often just gives me legal/real
15 estate jargon and expects me to know or understand what she
16 means without the least bit of detail.

17 Q That is sufficient.

18 MS. DENERSTEIN: And let's turn to Defense
19 Exhibit 1228.

20 Q Is this an e-mail between Martin Shkreli and Alan
21 Geller?

22 A It is.

23 Q And what is the date?

24 A April 30th, 2013.

25 Q And can we go to the bottom e-mail. The same date?

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1 A Yes.

2 Q And what does the e-mail state?

3 A Martin, 8 o'clock Friday at the Wolfgang on Park
4 Avenue. Looking forward to it. Would love to wrap this up
5 in New York. Al.

6 Q And can we go to the top e-mail from Mr. Shkreli?

7 A See you --

8 Q Go ahead, I'm sorry.

9 A See you Friday. I will nudge Evan. Do not know what
10 the issue is.

11 Q Okay.

12 MS. DENERSTEIN: Can we turn to the next section
13 to Defense Exhibit 2949, and can we go to the first e-mail
14 which is on the bottom.

15 Q Is this an e-mail from Evan Greebel sent on Thursday,
16 October 13th, 2011?

17 A Yes.

18 Q And who is it to?

19 A Martin Shkreli.

20 MS. DENERSTEIN: And, Mr. Carter, can you
21 highlight the text.

22 Q What does it say?

23 A Please send me the AUM number to file.

24 MS. DENERSTEIN: Can we go to the very next e-mail
25 and blow that up.

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1 Q What does Martin Shkreli respond to Mr. Greebel?

2 A 40M.

3 MS. DENERSTEIN: And can we go to the next e-mail,
4 please.

5 Q And is this an e-mail in response from Mr. Greebel to
6 Martin Shkreli dated the same date?

7 A Yes, it is.

8 Q And can you read what the question is and what the
9 answer is?

10 A Q: Please provide support for the statement that MSMB
11 is leading investment firm focused on global healthcare and
12 biotechnology opportunities. Please include additional
13 disclosure describing your business assets under management
14 and relevant investments or transactions of a nature similar
15 to your proposed transaction with AMAG.

16 Q Okay. Can we stop for a second.

17 MS. DENERSTEIN: And can we blow up beginning as
18 of October 1st, 2011.

19 THE COURT: And the answer portion?

20 MS. DENERSTEIN: Uh-huh. Yes, Your Honor.

21 THE COURT: And this one is admitted not for the
22 truth, correct?

23 MR. KESSLER: Yes.

24 MS. DENERSTEIN: Yes, Your Honor.

25 Q Can you read that sentence as of October 1, 2011?

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1 A As of October 1, 2011, MSMB and its affiliates at
2 \$40 million in assets under management. Neither MSMB nor
3 its affiliates have publicly announced or completed a
4 leverage buyout or take private transaction.

5 MS. DENERSTEIN: And if you go down again to the
6 bottom e-mail. Stop right there and blow up that.

7 Q That is e-mail is from Martin Shkreli to Evan Greebel
8 stating 40M, correct?

9 A 40M, yes.

10 Q Can we turn to Government's Exhibit 916?

11 MS. DENERSTEIN: Can you blow up the header of
12 what this says, MSMB Capital Man?

13 Q Does this say MSMB Capital Management, LP, and the
14 account balances?

15 A It does.

16 Q And if you go to the column ending balances, and go all
17 the way to the end of the chart, July, 2011. What is the
18 balance?

19 A Negative 33 cents.

20 MS. DENERSTEIN: Can we turn to
21 Government's Exhibit 917.

22 Q What is the heading of this chart?

23 A MSMB Healthcare, LP, ending account balances.

24 Q If you go to the exhibit October, 2011, to the combined
25 total.

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1 A Yes.

2 Q What is the combined total?

3 A \$340,000 -- \$340,792.

4 Q Is that \$40 million?

5 A No.

6 Q Okay. Can we turn to Defendant's Exhibit 104-99. A
7 few ahead.

8 Let me know when you are there.

9 A I'm there.

10 Q Great.

11 MS. DENERSTEIN: Can we go to the bottom e-mail,
12 please.

13 The very last one. It is on Bates Number 9808.

14 Q Is this an e-mail from Evan Greebel to Martin Shkreli
15 on February 7, 2013?

16 A Yes, it is.

17 Q And what does the e-mail state?

18 A What is the aggregate amount of the notes that
19 Retrophin owes MSMB, you or other affiliates?

20 Q And does Mr. Shkreli respond?

21 A He does.

22 Q And what does he say?

23 A Less than \$1 million. Will check full amount.

24 Q And what does Mr. Greebel respond?

25 A Thanks. Please also identify all affiliates that have

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1 notes.

2 Q And what does Mr. Shkreli respond?

3 A What is this for?

4 Q And what does Mr. Greebel respond?

5 A The schedules. They are all affiliate transactions and
6 if they are wrong, the investors could sue.

7 Q And what does Mr. Shkreli respond?

8 A Can you just refer to what is on the 8-K?

9 Q And what does Mr. Greebel respond?

10 A The 8-K refers to it as a note payable to a related
11 party. I have never determined whether MSMB and Retrophin
12 are affiliates for SEC purposes, but for the schedules I
13 would rather err on the side of caution. The 8-K references
14 a 900K note then valued at 914K. And then employee note for
15 30K with 15 percent interest. Were any others done?

16 Q And what does Mr. Shkreli respond?

17 A The 30K note was paid back. There is a 10K note, I
18 believe. The 900K note has partially been paid back.

19 MS. DENERSTEIN: And can we go to the top, the
20 next e-mail. Stop. Blow that up, please.

21 Q What does Mr. Greebel respond?

22 A A 10K note is not referenced. Here is the language
23 from the 8-K.

24 Q And can we go back to the language, Note 4, notes
25 payable. Is that part of this e-mail?

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1 A Yes, it is.

2 Q And is there a section also on related party
3 transactions Note 5 in this e-mail?

4 A Yes, there is.

5 Q And above this is where Mr. Greebel says here's the
6 language from the 8-K?

7 A Yes.

8 Q What does Mr. Shkreli respond?

9 A It was a subsequent event.

10 Q What does Mr. Greebel respond?

11 A Anytime the company wants to borrow money the Board
12 needs to approve it.

13 Q Then what does Mr. Shkreli respond?

14 A 200K has been paid back to MSMB recently. The 10K note
15 was an equity purchase by Steve Richardson. The 35K note
16 was paid back completely.

17 Q And then what does Mr. Greebel respond?

18 A The 10K I need to see the sub docs so I can have the
19 transfer agent process. Based on the other statements, I
20 will not revise the schedule.

21 MS. DENERSTEIN: Can we turn to Defendant's
22 Exhibit 1314. Can we go to the bottom e-mail on the first
23 page.

24 Q Is this an e-mail from Evan Greebel dated September 11,
25 2012, to Martin Shkreli, George Wang, and Jackson Su?

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1 A It is.

2 Q And does it refer to a diligence request list?

3 A It does.

4 Q What does it say?

5 A Guys, Attached is the diligence request list that I
6 want to send to Valiant. Please advise if you want me to
7 add anything. Evan.

8 Q And what does Mr. Shkreli respond?

9 A This is way too long and insane.

10 Q And what does Mr. Greebel respond?

11 A You are about to spend \$100 million on an asset. It is
12 important to know what you are buying. During the call I
13 learned that Valiant outsources and also does their own
14 manufacturing. They expect you to buy from them after the
15 close for a period of time. Diligence requests -- request
16 lists are designed to cover all applicable situations.

17 (FYI, the list to buy a company is approximately
18 12 to 13 pages).

19 Q And does Mr. Greebel send this to Mr. Wang and Mr. Su
20 as well as Mr. Shkreli?

21 A He does.

22 MS. DENERSTEIN: And can we go to the top e-mail,
23 please.

24 Q Is this from Mr. Wang to Mr. Greebel copied and also
25 Mr. Shkreli and Jackson Su?

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1 A Yes, it is.

2 Q What does he say?

3 A I think the list is comprehensive. Nothing to add on
4 my end. I will defer to you expertise here.

5 MS. DENERSTEIN: Can we go to Defense Exhibit 5181
6 and to the bottom of the chain, please.

7 Q Is this an e-mail from Mr. Greebel on Tuesday,
8 November 27, 2012, to Mr. Shkreli?

9 A It is.

10 Q And what does the e-mail state?

11 A Peter's guys keep hounding me for a post-money cap
12 table. So please consider the conversion and get me
13 something to show the --

14 (Continued on next page.)

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1 Q And does Mr. Greebel, I'm sorry, what's the next e-mail
2 in the chain?

3 A From Martin Shkreli to Evan Greebel on December
4 November 27, 2012, Does that include the Fearnow note?

5 Q And what does Mr. Greebel respond?

6 A Everything should be on there (including Ligand).

7 Q And how does Mr. Shkreli respond?

8 A Can we really represent what Fearnow might do with his
9 note?

10 Q And what does Mr. Greebel respond to Mr. Shkreli?

11 A I think it should be a line item.

12 Q And what does Mr. Shkreli respond to Mr. Greebel?

13 A It's not our capitalization, though.

14 Q And what does Mr. Greebel respond to Mr. Shkreli?

15 A But post money it's your company.

16 Q Can we turn to next to Defense Exhibit 5458. And can we
17 go to the bottom of the chain.

18 Is this an e-mail from Martin Shkreli to Evan
19 Greebel on Monday December 10, 2012?

20 A It is.

21 Q And is the subject Retrophin?

22 A Yes.

23 Q And what does the e-mail state?

24 A One question is can we pay bills this way with pretax
25 money to Ligand, Katten, and/or others and not pay the capital

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1 gains tax?

2 Q And what does Mr. Greebel respond?

3 A Once you sell the stock, it creates a taxable event.

4 Investing the proceeds in a separate transaction is a separate
5 event. Doing it through an IRA or 401(k) may have a different
6 outcome. It's a question for personal accountant.

7 Q And what does Mr. Shkreli respond?

8 A Forget 401(k)/IRA, we won't use that.

9 Q And what does Mr. Greebel respond?

10 A It's tax planning stuff. You are better off speaking
11 with an accountant.

12 Q Can we go to Defense Exhibit 1283 and can we go to the
13 bottom e-mail.

14 Is this an e-mail from Marek Biastec on December 18,
15 2012, to Evan Greebel, the subject Stock Questions?

16 A Yes.

17 Q And what does the e-mail state?

18 A Evan, can any of us sell RTRX stock privately for the
19 same price we bought it for to someone else, thanks MB.

20 Q And what does Mr. Greebel respond?

21 A You can sell the stock, however, and to whomever you want
22 except to affiliates of the company avoiding tax penalties
23 that may be imposed on the taxpayer.

24 Q And what does Mr. Biastec respond?

25 A But can it be sold for the same price i.e., .001 dollars

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1 per share.

2 Q And what does Mr. Greebel respond?

3 A Up to you.

4 Q And what does Mr. Biastec respond?

5 A Do you have any documentation that you can provide that
6 shows the Fearnow stock is not restricted from trading?

7 Q And what does Mr. Greebel respond?

8 A There is no legend on it. Restricted stock always has a
9 legend on it.

10 Q And what is the date of this e-mail?

11 A December 9, 2012.

12 Q Did you say December 9th?

13 A Excuse me, 19th. December 19th.

14 Q Okay. Let's turn to Defense Exhibit 1306.

15 Can we go to the bottom e-mail.

16 Is this an e-mail between Evan Greebel and Martin
17 Shkreli?

18 A It is.

19 Q And is the date December 31, 2012?

20 A Yes, it is.

21 Q And can you read the text?

22 A Procedures/rules for bringing people over the wall. What
23 happens if a "confi" is not in place?

24 Q Does Mr. Shkreli respond?

25 A He does.

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1 Q That same day?

2 A Yes, the same day.

3 Q And what does he respond?

4 A "Confi" in place for everyone.

5 Q And does Mr. Greebel respond?

6 A He does.

7 Q And it's the same date?

8 A Yes, it is.

9 Q And what does he say?

10 A That's all that matters BC barring that we would have a
11 FD issue.

12 Q Okay. Let's turn to Defense Exhibit 1903.

13 Is this then e-mailed from Meg?

14 Actually, let's go down to the bottom e-mail.

15 Is this an e-mail on September 30, 2014, from Evan
16 Greebel?

17 A It is.

18 Q And what does he state?

19 A Marc and Meg, As previously discussed attached is the
20 response is the confidential treatment comment letter which we
21 sent to the SEC today. Atherion's counsel reviewed and
22 approved the response prior to it being sent. Please let mow
23 know if you have enough questions. Best regards, Evan.

24 Q Does Ms. Valeur Jensen respond?

25 A She does.

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1 Q Does she respond on September 30th, the same day?

2 A She does.

3 Q Is Mr. Panoff copied?

4 A He is.

5 Q And what does she respond to Mr. Greebel?

6 A Evan, please stand down on all Retrophin matters other
7 than active litigation until we can review all open matters.
8 Thanks.

9 Q Okay. Can we go to Defense Exhibit 1315.

10 THE COURT: Was this in evidence?

11 MS. DENERSTEIN: It was on the list I read earlier
12 to you.

13 THE COURT: You mean yesterday?

14 MS. DENERSTEIN: No, I mean today.

15 THE COURT: All right.

16 Q Defense Exhibit 1315. Can we go to the bottom e-mail.
17 Go up one.

18 Is this an e-mail from Mr. Greebel to Martin Shkreli
19 dated February 15, 2013?

20 A Yes.

21 Q And what does it say?

22 A Thanks. 100K a day works for me until we get there.

23 Q What does Martin Shkreli respond?

24 A Great.

25 Q And what does Mr. Greebel respond?

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1 A You should send your BD an e-mail update when you get a
2 chance.

3 Q And what does Martin Shkreli respond?

4 A Been in close contact with them since, no need.

5 Q And what does Mr. Greebel respond?

6 A Even better.

7 Q Can we turn to Defense Exhibit 1010 in evidence.

8 Is this an e-mail from Martin Shkreli to Andrew
9 Vaino on March 7, 2013?

10 A It is.

11 Q Is the subject Vaino Employment Agreement?

12 A Yes.

13 Q And is the Andy Vaino Employment Agreement listed as the
14 attachment?

15 A It is.

16 Q And is there an employment agreement attached?

17 A Yes, there is.

18 Q And what is the date of the employment agreement in the
19 first paragraph of the document on Bates Page 1223?

20 A March 7, 2013.

21 Q Can we go to Bates Page 1223 just the top. Can we go to
22 the last page which is 1232?

23 Is this document signed?

24 A It is.

25 Q By whom?

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1 A Martin Shkreli, CEO.

2 Q Can we turn to Defense Exhibit 1309?

3 Can we go to the bottom e-mail, please.

4 Is this an e-mail from Evan Greebel to Mike Lavelle
5 on May 3, 2013.

6 A He is.

7 Q Is he copied?

8 A Yes.

9 Q Is this subject: Draft Settlement Agreement?

10 A Yes.

11 Q What does it say?

12 A Hi, Michael. As discussed, attached is a draft of the
13 settlement agreement. If you have any questions or comments
14 please call me at (212) 940-6383. Best regards, Evan.

15 Q Does Mr. Lavelle respond?

16 A He does.

17 Q And what does he state?

18 A Thank you, Evan. I will run the document past the lawyer
19 but see no material issues with the principle or agreement in
20 detail. The amounts, however, are not what I expected. At
21 the time of our conversation, the mark I had on MSMB was
22 \$1,267,000 and the stock as at five. We discussed two times
23 my initial investment in a mix of cash and stock. Stock at
24 the time was worth \$645,000, so we have a \$355,000 gap which I
25 will agree can either be in cash or stock. Please discuss

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1 with Martin. I have Linkletters reviewing your agreement and
2 am confident that we can resolve quickly. Regards, Michael.

3 Q And is this e-mail forwarded to Mr. -- or given to
4 Mr. --

5 Is this e-mail in the e-mail to Mr. Shkreli that
6 comes next?

7 A Yes, it is.

8 Q And what does Mr. Greebel say to Mr. Shkreli?

9 A Please see below from Lavelle.

10 Q And does Mr. Shkreli respond?

11 A He does.

12 Q And on the e-mail that Mr. Greebel sends to Mr. Shkreli,
13 is Mr. Lavelle copied going back down?

14 A No.

15 Q And in Mr. Shkreli's response, whom does he copy if
16 anybody?

17 A Michael Lavelle.

18 Q And what does he say?

19 A I agree to should be a total of two times your initial
20 investment. Please fix, Evan. I was very, very clear on the
21 call with Lavelle. I am, therefore, disappointed that you
22 sent him an underwhelming non-agreed upon deal. The 300K
23 dollar savings doesn't help me and only frustrates a key
24 partner of ours and myself embodied in the deal we agreed
25 upon, please.

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1 Q And what does Mr. Lavelle respond and to whom?

2 A To Mr. Shkreli and Mr. Greebel. Thank you, I look
3 forward to the revised document. As I said, legal comments
4 are not material.

5 MS. DENERSTEIN: Your Honor, may I have one moment?

6 THE COURT: Yes.

7 Q Mr. Dooley, we've shown you a lot of charts. Who
8 prepared the charts?

9 A Gibson Dunn.

10 MS. DENERSTEIN: No further questions, your Honor.

11 THE COURT: All right. Are the jurors ready for a
12 midafternoon break?

13 THE JURY: (Collectively) Yes.

14 THE COURT: Okay.

15 (Jury exits courtroom at 3:29 p.m.)

16 THE COURT: Sir, you can step down.

17 THE WITNESS: Thank you, your Honor.

18 (Witness leaves the witness stand.)

19 THE COURT: Ten minutes. We have a note that the
20 jurors want to know when this trial will end. They would like
21 clarification.

22 MR. PITLUCK: So, your Honor, I've provided
23 Mr. Dubin with some proposed language. We'll talk about it
24 now and we'll have something agreed upon for the Court to say
25 to the jury at the conclusion of the day.

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1 THE COURT: Very good. Thank you.

2 (A recess in the proceedings was taken.)

3 THE COURT: Are we ready to go back on the record?

4 MR. KESSLER: Yes.

5 THE COURT: I have a sense of unease about the way
6 those exhibits came in and whether instructions were given at
7 the appropriate time. There were a number of numbers ticked
8 off yesterday and then today, I felt like there were exhibits
9 coming in there were no instructions requested; there was no
10 motion to move them in.

11 I know we discussed them, but the parties should not
12 assume that they are in evidence. If you haven't moved them
13 in, and if the transactions have not been given. So I hope
14 that you will make sure the record reflects what the parties
15 intend.

16 I also have a proposed, jointly proposed, language
17 to read to the jury after today's proceeding concludes. I
18 would add that at least a couple of jurors, Ms. Jackson has
19 indicated, they care not to come in the week following the
20 Christmas holiday. The week between Christmas and New Year's.

21 But the instruction that the parties have agreed to
22 reads as follows:

23 The parties anticipate that the case will be
24 completed and the jury will be charged and deliberating by the
25 end of this week. You are, of course, free to deliberate as

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1 long as you deem necessary.

2 In the event that your deliberations are not
3 completed by Friday, and I will say December 22nd so we're
4 clear, we anticipate returning to court to resume
5 deliberations on Tuesday, December 26th following the holiday.

6 With the exception of the New Year's holiday on
7 Monday, January 1st, the Court will sit each day until you
8 have completed your deliberations.

9 If you have any scheduling conflicts that cannot be
10 moved, please let my courtroom deputy know as soon as
11 possible.

12 So we'll float that this is the plan and they should
13 speak up if they can't come in. I'm just not sure whether
14 this is a strong preference or whether it's really something
15 where the jurors are unavailable. They just said this they do
16 not want to company in. Some of them.

17 MR. PITLUCK: It's also possible, Judge, that their
18 position might change if they know they're going to be
19 deliberating as opposed to hearing evidence. So we would
20 respectfully request that the Court deliver that and see if it
21 changes it. Obviously, if there are problems or commitments
22 that can't be moved, then we will address those as they arise.

23 THE COURT: All right. Just so I'm clear, also, is
24 the Government not offering a rebuttal case?

25 MR. PITLUCK: I'll let Mr. Kessler address that.

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1 MR. KESSLER: We're down to one exhibit we disagree
2 about.

3 THE COURT: Okay.

4 MR. KESSLER: Mr. Brodsky's current position is that
5 if the exhibit was to come in at all, it should come in
6 through the a rebuttal witness, so we're thinking about that.
7 But we're talking about a rebuttal case with one document at
8 this point.

9 THE COURT: Is there a ground or admission that the
10 parties want to offer and have me rule on the admissibility as
11 we have for all the other exhibits.

12 MR. KESSLER: I'm happy to.

13 MR. BRODSKY: We're happy to debate it, your Honor.
14 The issue would be whether or not it would come in through
15 Mr. Dooley because we think that, I mean, we can debate the
16 issue and show you the exhibit. But we debated this one
17 before and your Honor has ruled on it and you ruled it
18 inadmissible. We think if it comes in, we should be able to
19 get in other related exhibits which because we think it's
20 misleading and there are a number of grounds which we don't
21 think it's admissible.

22 MR. KESSLER: I'm happy to explain and we could
23 decide.

24 THE COURT: I have no idea what exhibit it is.

25 MR. KESSLER: Government Exhibit 613.

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1 THE COURT: And would the Government want to admit
2 the entire document because, once again, as we've previously
3 discussed, this document includes investors whose names --

4 MR. KESSLER: Exactly.

5 THE COURT: -- are not before the jury and it could
6 create the same kind of confusion that we had about some of
7 these other exhibits.

8 The concerns that we have about some of the other
9 exhibits confusing the jury where they may believe that, you
10 know, they may speculate beyond what the parties are actually
11 contesting here.

12 MR. KESSLER: I understand the concern. We don't
13 need to introduce the entire exhibit. We're happy to redact
14 the names. The real point, as the Court may recall on
15 cross-examination, one of the documents shown to Mr. Dooley
16 there were several documents shown to Mr. Dooley that were
17 offered to sort of talk to the defendant's state of Mind about
18 how consulting agreements were used. And one of the documents
19 as an e-mail relating to Stuart Weg who is not -- who has not
20 appeared at all in, I'm not sure who he is, and it is really
21 offered for the top e-mail in which Mr. Shkreli hidden payment
22 I don't want it, but if it's a real consulting agreement
23 that's okay.

24 So this e-mail is being offered for a similar point.
25 The party or he, Mr. Shkreli and Mr. Greebel's, understanding

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1 of how consulting agreements were being used.

2 On the first page at the bottom, Mr. Greebel asked
3 Mr. Shkreli, do you want the remaining 15K, the 15,000 shares
4 to come from the fully traded group talking about shares owed
5 to Mr. Koestler. Mr. Shkreli says, I'd rather the shares come
6 from the company and Mr. Greebel says, So consulting
7 agreement?

8 And the jury is entitled to draw an inference that
9 the defendant and Mr. Shkreli are viewing consulting
10 agreements as simply a vehicle for funneling shares from the
11 company because the company has to approve the issuance of
12 shares. There has to be some pretext for why the shares are
13 issued and the consulting agreement is that pretext.

14 So it goes to same point as this Stuart Weg e-mail
15 which is the understanding of what a consulting agreement
16 does. The fact that it's Mr. Koestler doesn't matter, we
17 don't need his name, the rest of the e-mail chain is not
18 necessary. That's really the point.

19 MR. BRODSKY: Your Honor, we have multiple grounds
20 of objections.

21 First, your Honor already ruled on Mr. Koestler and
22 is based on the Government's own statements with respect to
23 Mr. Koestler prior to trial. The Government tried to admit
24 this exhibit on their case-in-chief and it was precluded
25 because the Government had made representations to us with

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1 respect to Mr. Koestler.

2 We did not cross-examine Mr. Aselage and
3 Mr. Richardson and other witnesses relating to Mr. Koestler
4 based on the Government's representations prior to trial.

5 Mr. Koestler, as your Honor knows, won an
6 arbitration proceeding and we had pretrial motions relating to
7 Mr. Koestler. The Government had said that they weren't going
8 to true any evidence related to him.

9 This document in and of itself contains hearsay
10 throughout the document that's inadmissible for any purpose.
11 This document in and of itself does not respond to anything
12 related to Mr. Weg and that particular consulting agreement.

13 This is misleading because this consulting agreement
14 is actually never entered into and there is an entire story
15 around why and the purpose. They're taking one snippet of an
16 e-mail which is out of context and help want to offer it up
17 with the state of mind, but this was not the proper state of
18 mind if you look at all the facts relating to Mr. Koestler and
19 our view is if they want to introduce this exhibit, we think
20 it's inadmissible, and if your Honor ruled otherwise, they
21 should have their own witness on the stand so we would be able
22 to introduce the countervailing documents that show that this
23 is a misleading document.

24 And so, we don't think this is admissible. This
25 doesn't respond to any part of the rebuttal case. We never

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1 opened the door relating to Mr. Koestler. We purposely kept
2 it out. We never introduced any documents relating to
3 Mr. Koestler for that reason. And we relied on your Honor's
4 ruling with respect to the inadmissibility of Mr. Koestler in
5 preparing other rebuttal case.

6 MR. KESSLER: But the point here is simply the
7 reaction to a desire to send shares from the company and the
8 proposal is to use a consulting agreement as opposed to from
9 the freely traded group. I can't imagine that the defense
10 closing is going to focus on Stuart Weg. The argument is
11 going to be about that top e-mail and it's not going to be
12 limited to Stuart Weg.

13 So the fact that someone else's name was on that
14 e-mail I don't think has bearing here. It's responsive to the
15 reason that Stuart Weg e-mail is actually being offered which
16 is for the state of mind of the people engaged in the
17 conversation. Again, we don't have to use Mr. Koestler's
18 name, none of that is necessary.

19 MR. BRODSKY: Your Honor, this is disconnected in
20 time from the Weg e-mail and it's also disconnected to all
21 other evidence around this time which we would want to offer
22 in evidence. It countervailed this view about the state of
23 mind relating to Mr. Koestler.

24 This is very peculiar to Mr. Koestler, and if the
25 Government had actual responsive documents with respect to

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1 Weg, they could introduce those particular documents that
2 respond to that. But this is a very -- this is a whole
3 separate -- there's a whole separate stream of case -- of
4 e-mail communications, a line of communications relating to
5 Mr. Koestler which is the subject of a huge arbitration,
6 multi-day arbitration.

7 THE COURT: I'm afraid it will -- I mean if there is
8 any reference to Koestler, it will certainly get into a
9 distraction and a confusion. I was thinking about whether
10 there were ways to excise his name or take out the e-mail
11 story of August 20th at 11:27 a.m. from Steve Cavelli
12 everything after that or prior to that, I should say, in time.

13 MS. DENERSTEIN: The problem is, your Honor, if you
14 take out Mr. Koestler's name, you take out context. Then
15 we're not going to be able to respond at all to all the
16 history related to Mr. Koestler. We would want the ability to
17 be able to respond and bring in -- if they're going to bring
18 this in, which we think is inadmissible because we haven't
19 opened the door to Mr. Koestler.

20 They're opening the door to Mr. Koestler. They told
21 us in pretrial rulings they weren't going to do it. This is a
22 reversal. They tried this, your Honor, in their case-in-chief
23 and your Honor precluded it. This does not respond to the Weg
24 e-mail. This is not responsive in any way to that.

25 MR. KESSLER: So I take it that Mr. Brodsky the Weg

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1 e-mail will not be used to argue anything about any consulting
2 agreement other than Stuart Weg.

3 MR. BRODSKY: Yes.

4 MR. KESSLER: And if it is mentioned --

5 MR. BRODSKY: Admit it into evidence, you know,
6 that's how -- we're not going to argue -- we're going not
7 going argue beyond that state of mind with respect to that
8 e-mail.

9 MR. KESSLER: But the state of mine related to
10 Stuart Weg is totally irrelevant in the case.

11 THE COURT: Which is why the jury would have, if it
12 hasn't been instructed that this is not being offered for the
13 truth, but was proffered by the defense to show state of mind
14 of Mr. Shkreli.

15 MR. KESSLER: Generally. Not about Stuart Weg in
16 the same way this is general state of mind, not about
17 Mr. Koestler. That's the point.

18 The Stuart Weg e-mail that kept -- that e-mail was
19 not admitted to address Stuart Weg who has nothing to do with
20 this case. That e-mail was admitted for a general viewpoint
21 and I understand it's going to be used that way. And so, you
22 know, that's the discussion we had yesterday. It wasn't
23 Martin Shkreli's understanding that Stuart Weg was important.
24 It has nothing to do with anything.

25 MR. BRODSKY: It was the timing of that particular

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1 e-mail.

2 MR. KESSLER: Late July.

3 MR. BRODSKY: Which is relevant with respect to
4 disclosures to Marcum and the state of mind of that particular
5 point. The Government is arguing propensity essentially. If
6 they want to get this in, they're going to argue that this is
7 somehow a propensity. And the problem is, your Honor, that
8 Mr. Koestler is a special story. There's a special story with
9 hundreds of e-mails and communications relating to
10 Mr. Koestler over a long period of time. And to introduce it
11 this way, it can't be redacted because it's highly
12 prejudicial, it be precludes us from responding in kind.

13 And so, we relied on the Government's own
14 representations. We relied on the fact when we were putting
15 on a rebuttal case that we -- that this was precluded from
16 being introduced into evidence. If we knew this was coming
17 into evidence, we would have had a different rebuttal case as
18 well. We weren't able to question Mr. Aselage and
19 Mr. Richardson about it.

20 MR. KESSLER: It's a single e-mail that directly
21 addresses something on the defense case. It's not -- there's
22 no defense rebuttal case, no one is injecting Koestler
23 wholesale in this case. It's simply being offered for state
24 of mind and that's our offer and we're happy to redact
25 portions. And, you know, we'll accept the Court's ruling

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1 either way.

2 THE COURT: I mean, if you've made a representation
3 to the defense, and if they've predicated at least parts of
4 their defense on that representation, you would not be
5 introducing evidence regarding Mr. Koestler. Then I do think
6 you should --

7 MR. KESSLER: We didn't.

8 THE COURT: -- abide by it.

9 MR. KESSLER: We didn't in our case-in-chief.

10 THE COURT: Mr. Brodsky says that you did make that
11 representation and this was objecting --

12 MR. KESSLER: We made the representation about our
13 case-in-chief, we didn't. This is now responding to an e-mail
14 we couldn't possibly have conceived would have come into
15 evidence because this is about Stuart Weg. That came into
16 evidence, that did not come into evidence to talk about Stuart
17 Weg. It was about three weeks prima facie this e-mail. It
18 came for Mr. Shkreli and Mr. Greebel's state of mind about
19 consulting agreements. That's the only reason it's different
20 than our representation which is we're not getting into the
21 Koestler arbitration.

22 MR. BRODSKY: The Weg e-mail is three weeks after.
23 It's not three weeks before.

24 Your Honor, you were very particular, your Honor,
25 when you ruled with respect to Delzotto. And if they were

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1 going to get into evidence cross-examining Mr. Delzotto, it
2 would have to be narrow and would have to be directed towards
3 the particular e-mail.

4 And so, we identified a narrow group of e-mails that
5 were particularly responsive to particular e-mails of
6 Special Agent Delzotto that he was introducing. We have the
7 equivalent summary witness on the stand and now they're
8 trueing an e-mail completely disconnected from the Weg e-mail
9 in both time and both topic and subject matter and, again, it
10 is -- to does affect us that they made this representation
11 prior to trial and we relied on it and they tried to get this
12 document into evidence during their case-in-chief. It's not
13 like they didn't try, they did, and your Honor precluded to.

14 THE COURT: Right. So I guess part of the issue is
15 that the defense chose to provide documents to the Government
16 regarding its case after the Government rested and didn't
17 really tell the Government whether it was going to present a
18 defense case and I think the documents themselves came in
19 little trickles and I did try to resolve as many of the
20 defense exhibits as possible over the course of the more
21 recent days to try to define what was admissible and what
22 would save time.

23 So the Government could not necessarily have
24 anticipated that the Weg e-mail would be used to show
25 Mr. Shkreli's frame of mind, you know. It's obviously an

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1 exculpatory e-mail that Mr. Shkreli is saying, you know, I
2 don't want these consulting agreements it be meaningless.

3 So the Government in its rebuttal case wants to say,
4 well, here's an e-mail that shows a state of mind where the
5 parties are Mr. Shkreli and Mr. Greebel are talking about
6 using the consulting agreement to tap into shares from the
7 company.

8 MR. BRODSKY: They never actually do it, your Honor,
9 this has a whole stream of communications. There were other
10 communications related to it. They may never actually do
11 this. The Government had the Weg e-mail for days.

12 THE COURT: Was it --

13 MR. BRODSKY: They never brought this up that they
14 were trying to introduce this in response. It was incumbent
15 upon them to tell us if we were going to introduce that e-mail
16 this was going to be the argument in return.

17 MR. KESSLER: We did. When Ms. Denerstein was
18 here -- you can check the transcript -- we mentioned
19 Government Exhibit 613 maybe two or three trial days ago as we
20 were talking about these various e-mails that went to the
21 defendant's state of mind I believe Mr. Pitluck brought it up.

22 MS. DENERSTEIN: I don't recall that but I also
23 recall your Honor withdrew certain exhibits on that section in
24 response that had to do with consulting. The only thing that
25 was left was Dr. Weg and then Ken Banta which is already part

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1 of this case. But that was in response to some of what you
2 said.

3 I don't recall whether 613 was mentioned or not, but
4 I also respectfully disagree with the characterization of the
5 production. I mean, they've had our documents for a number of
6 days before Mr. Dooley finished testifying and they gave us
7 these at lunch, so --

8 MR. BRODSKY: Today.

9 THE COURT: I'm just saying that they the Government
10 may not have been able to be aware that you were going to use
11 the Ken -- the Weg e-mail to argue state of mind of
12 Mr. Shkreli. And so, I do think the less we open up issues
13 that are not necessary the better.

14 I just wanted to say on the record that I understand
15 why this is coming up now. I still don't know that it's a
16 good idea to allow this document to be admitted because
17 Koestler is a name that the jurors haven't heard about.

18 There's obviously an agreement here to prep the
19 consulting agreements with the idea in mind that Retrophin
20 shares will be used. And whether or not that ever came to
21 fruition is not that relevant, frankly, in terms of the
22 conspiracy charge. They don't necessarily have had to have
23 succeeded in defrauding Retrophin if there was an agreement to
24 do it as you know.

25 Nonetheless, I think we are so close to being

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1 finished here and if this is the only document. I do think
2 that they are raising this under §403 for not opening the door
3 to information that would compel the defense to introduce a
4 multitude of other e-mails that they think are relevant to
5 this to counteract exhibit, Government Exhibit 613, and I
6 would be disinclined to admit it before testimony regarding it
7 with all respect for the government.

8 MR. KESSLER: For the record, it's transcript 9773
9 is when we discussed this document on Friday.

10 THE COURT: That was at a bench conference when we
11 were discussing --

12 MR. KESSLER: When Ms. Denerstein and I were going
13 through it.

14 MS. DENERSTEIN: I was not given the document. I
15 don't know if they mentioned it, there was a lot going on. I
16 certainly didn't have any understanding that that was their
17 objective.

18 But regardless, your Honor, I apologize for the
19 exhibits. We'll look at the rough transcript tonight. I've
20 talked to Ms. Smith and we do intend to rest after Mr. Dooley,
21 but we'll put it in subject to the review the exhibits.

22 And, again, I just was probably doing too much, so I
23 think we got them all any apologize.

24 THE COURT: I have a sense of unease about the way
25 exhibits have come in and whether the Government has had an

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1 tuned to make whatever qualifications had been agreed to.

2 The Court's list I don't think makes those fine
3 points to could, but it doesn't. And so.

4 MS. DENERSTEIN: We can prepare such a list.

5 THE COURT: You should confer and also confer with
6 Ms. Jackson.

7 MS. DENERSTEIN: We will.

8 THE COURT: Are you going to reserve your resting
9 until tomorrow?

10 MS. DENERSTEIN: We would like to rest after we
11 resolve subject any exhibit issues.

12 THE COURT: Would you want to make those known to
13 the jury?

14 MS. DENERSTEIN: I think it depends. If we've
15 already read it and it simply just offering it, I think we can
16 just probably do it on the record if the Government agrees.

17 THE COURT: So please work that out as soon as you
18 can.

19 MS. DENERSTEIN: We will. It will be done.

20 (A brief pause in the proceedings was held.)

21 MR. KESSLER: Your Honor, setting aside that
22 exhibit, there are and my understanding no other exhibits, no
23 other objections to the documents we'll were offered during
24 the cross and they were very few.

25 THE COURT: That's good do hear thank you.

Proceedings

10095

1 (A brief pause in the proceedings was held.)

2 THE COURT: The charge have been up for about an
3 hour and a half I would encourage you all to read them. Read
4 the verdict sheet hopefully we have no other issues, and we
5 can move forward.

6 (A brief pause in the proceedings was held.)

7 (Continued on the next page.)

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Dooley - Cross - Kessler

10096

1 THE COURT: Does the defense want to retrieve the
2 exhibits?

3 MR. KESSLER: I think if we leave them there it will
4 be more efficient.

5 (Whereupon, the witness resumes the stand.)

6 (Jury enters the courtroom.)

7 THE COURT: All jurors are present.

8 Mr. Dooley, you're still under oath and at this
9 time.

10 Mr. Kessler, you may commence your
11 cross-examination.

12 MR. KESSLER: Thank you.

13 CROSS EXAMINATION

14 BY MR. KESSLER:

15 Q Good afternoon, Mr. Dooley.

16 A Good afternoon.

17 Q I think you told us when you first began testifying that
18 you're paid \$575 an hour; is that right?

19 A That's correct.

20 Q How many hours have you worked as of now on this case?

21 A Well, when I last testified last week about that I think
22 I accumulated about \$24,000 in hours. I don't know what it is
23 today. I haven't totaled those numbers.

24 Q Do you have an estimate how much more time you spent
25 since you began testifying?

Dooley - Cross - Kessler

10097

1 A Maybe 16 more hours.

2 Q So about another eight or \$9,000, so between 30 and
3 \$40,000 in your hourly billing?

4 A Approximately, yes.

5 Q Do you have a staff or associates who also work with you
6 on this case?

7 A No.

8 Q Are you being compensated in any other way for your
9 testimony, other than through your hourly billing?

10 A My hotel rate is picked up, my meals.

11 Q You said you were retained by the defense in August of
12 2017; is that right?

13 A That's correct.

14 Q You met with defense counsel repeatedly since then?

15 A Yes.

16 Q You've reviewed documents as part of this case?

17 A Yes, I have.

18 Q I want to ask you first about your understanding of the
19 events in this case. You didn't participate in any events
20 related to this case between 2012 and 2015, correct?

21 A Correct.

22 Q You have no first-hand knowledge of the events in this
23 case at all?

24 A None.

25 Q You didn't create any of the documents you testified

Dooley - Cross - Kessler

10098

1 about on direct?

2 A I did not.

3 Q You didn't send or receive any of them?

4 A No.

5 Q You didn't pick the documents you testified about?

6 A I did not.

7 Q Those are all picked by defense counsel?

8 A Yes.

9 Q Did you read all the documents that were selected by
10 defense counsel?

11 A Yes.

12 Q You also testified about a number of demonstrative charts
13 that were shown to the jury, do you recall that?

14 A I do.

15 Q I believe you testified that the defense counsel prepared
16 those charts; is that right?

17 A That's right.

18 Q Did you have any input into what went on the chart?

19 A I ticked and tied the chart to make sure the exhibit
20 number was correct, the date was correct, the subject matter
21 was correct, the to the from, the CC was all correct.

22 Q When you say the subject matter, you mean the subject
23 line of an e-mail?

24 A Correct.

25 Q So not the subject matter of the document in general.

Dooley - Cross - Kessler

10099

1 A Correct, the subject line of the e-mail.

2 Q You didn't pick which documents went on the chart?

3 A I did not.

4 Q Now, you're aware that these charts have been revised
5 several times both before and during your testimony, correct?

6 A Yes.

7 Q So the final demonstratives shown to the jury in some
8 cases were not the same in all respects as the initial
9 demonstratives that were created?

10 A Yes. And I actually made sure that some of those
11 corrections were made.

12 Q Okay. So did you reverify the accuracy in each of the
13 demonstratives each time it was recreated?

14 A I tried to, but during my testimony you can see I missed
15 something in one of my earlier charts, I corrected that on the
16 stand.

17 Q If I can have the Elmo. I want to ask you to start with
18 one of these charts, this is Defense Exhibit 110-27. Do you
19 remember that?

20 A 110-47?

21 Q Forty-seven, there we go. You remember testifying about
22 this on direct?

23 A Yes, I do.

24 Q You didn't create this chart?

25 A I did not.

Dooley - Cross - Kessler

10100

1 Q Do you know when this chart was created?

2 A I do not.

3 Q This chart shows some share transfers related to
4 Government's Exhibit 111-26?

5 A Yes, I recall.

6 Q I think you testified on direct that it was a fair and
7 accurate representation of the documents in Government's
8 Exhibit 111-26?

9 A Yes.

10 Q But this doesn't show all of the information from
11 Government's Exhibit 111-26, right?

12 A Yes, I believe that's correct. I believe there are a
13 number of other charts that also don't include all of the
14 documents.

15 Q So what makes it fair and accurate?

16 A It's a fair and accurate representation of what I'm
17 talking about, what I've been asked to speak about.

18 Q So you were just asked to speak about the share transfers
19 on this particular chart?

20 A Yes.

21 Q So for example, you weren't asked to talk about the dates
22 of any of these transfers, right?

23 A No.

24 Q The defense chart, which you verified, doesn't say
25 anything about the dates of these transfers, right?

Dooley - Cross - Kessler

10101

1 A It does not.

2 Q So this chart is fair and accurate in the your view only
3 to the extent that the data on the actual chart matched to the
4 document?

5 A Correct.

6 Q You're not offering any opinion about anything else that
7 this chart shows or doesn't show?

8 A I am not.

9 Q Do you recall testifying today about a consulting
10 agreement related to Mr. Blanton?

11 A Yes.

12 Q I think you looked at Defense Exhibit 1106, which was an
13 e-mail from March 2014, in which I believe it was Mr. Greebel
14 who wrote, "Blanton is done," do you remember that?

15 A I remember those words. I don't remember the exhibit
16 number.

17 Q You remember it was a March 2014 e-mail, right?

18 A I don't remember that.

19 Q Well, so you're aware that Mr. Blanton received an option
20 agreement in August of 2013, right?

21 A No, I'm not.

22 Q You didn't testify about the option agreement, right?

23 A I don't remember testifying about an option agreement
24 Mr. Blanton.

25 Q You're aware that Blanton received a consulting

Dooley - Cross - Kessler

10102

1 agreement, a draft, in September 2013?

2 A Could you show me the document to refresh my
3 recollection?

4 Q I'm trying to see having testified about the final
5 version, I'm trying to see if you remember the other
6 documents. Did you remember there was a September 2013 draft
7 consulting agreement for Darren Blanton?

8 A Again, without seeing the document -- unfortunately, I
9 testified to a lot of documents, counselor.

10 Q You didn't testify about a September 2013 draft
11 consulting agreement, right?

12 A I don't remember if I did or not.

13 Q You didn't testify about an October 2013 settlement
14 agreement that was offered to Darren Blanton, did you?

15 A I don't have any recollection of any document that you're
16 referring to.

17 Q And you were also, when you were talking about consulting
18 agreement, you were shown a document related to someone named
19 Stuart Weg, MD; do you remember that?

20 A I remember the name, yes.

21 Q You have no idea who Stuart Weg MD is, right?

22 A I do not.

23 Q You were shown a number of Board minutes, do you remember
24 that?

25 A Yes.

Dooley - Cross - Kessler

10103

1 Q You have no idea what was actually discussed at any of
2 the Board meetings associated with those minutes, right?

3 A That's correct.

4 Q And you have no idea what was agreed ed to or not agreed
5 to at any of those meetings, right?

6 A Correct.

7 Q You have no idea if the minutes are accurate?

8 A I do not.

9 Q You just read the minutes that were put in front of you.

10 A I read the minutes that were represented as minutes in
11 the documents, represented to me as Government and defense
12 exhibits.

13 Q Represented minutes, they said minutes, someone told you
14 they were minutes?

15 A Correct.

16 Q You testified about a chart that shows some distribution
17 of minutes, do you remember that? It's Defense Exhibit 7A,
18 I'll put it up.

19 A Yes.

20 Q This is one of the demonstrative charts, do you recall
21 testifying about Defense Exhibit 7A?

22 A Yes, I do.

23 Q I believe you testified that this demonstrative lists
24 several exhibits that show when Board minutes or sets of Board
25 minutes were sent to various people; is that correct?

Dooley - Cross - Kessler

10104

1 A Correct.

2 Q So the first e-mail that's on your -- defense counsel's
3 demonstrative is December 2013, right?

4 A Yes.

5 Q So that's the first e-mail on this demonstrative showing
6 that Board minutes were sent to anyone associated with
7 Retrophin, right?

8 A I don't know if that's accurate. It's the e-mail
9 distribution of minutes that I was provided in the chart that
10 I referred to and the documents that I referred to. I have no
11 idea if there are distribution minutes before December 12,
12 2013.

13 Q I just asked, the first e-mail on the chart you testified
14 about in this trial is December 2013, right?

15 A Correct.

16 Q Nothing before that?

17 A Nothing that I know of but.

18 Q If we look at the first 1, 2, 3 entries there are all
19 dated December 12, 2013; is that right?

20 A That's correct.

21 Q Those are e-mails between Mr. Greebel and Mr. Panoff and
22 in one case Mr. Jain and Mr. Hackert, correct?

23 A Correct.

24 Q Then there is one in May that also goes to Mr. Hackert?

25 A Correct.

Dooley - Cross - Kessler

10105

1 Q Another one many May also goes to Mr. Hackert?

2 A Correct.

3 Q Another one in August that goes to Mr. Hackert?

4 A Correct.

5 Q No e-mails on the first page of your chart that go to the
6 Retrophin Board of Directors, right?

7 A On this chart, yes.

8 Q If we go to the second page of the chart, three more
9 entries for September and October 2014. Do you see that?

10 A I do.

11 Q I apologize for the handwriting, you had switched the
12 2013 to 2014 so I did that too.

13 A Thank you.

14 Q The first e-mail that goes to someone associated with the
15 Retrophin Board of Directors in your demonstrative is
16 September 2014, correct?

17 MS. DENERSTEIN: Objection.

18 THE COURT: Rephrase.

19 Q Do you know who Meg Valeur-Jensen is?

20 A I do not.

21 Q So the first e-mail that went to Meg Valeur-Jensen was
22 September 2014, right?

23 A Yes, on this chart.

24 Q On this chart, right. You were also shown an e-mail
25 where Mr. Panoff -- strike that.

Dooley - Cross - Kessler

10106

1 Do you remember DX9151, an e-mail from Mr. Greebel
2 to Mr. Panoff that attaches a number of Board minutes, do you
3 remember that?

4 A Yes.

5 Q One of those sets of Board minutes was for April 2013, do
6 you recall that?

7 A I don't recall that without looking back at DX9151.

8 Q You can check or accept my representation that the
9 April 2013 Board minutes -- it's toward the end of binder
10 three.

11 A Thank you. Yes.

12 Q So the April 2013 Board minutes were included in that
13 9151 e-mail, right?

14 A April 22, 2013.

15 Q Right. So that's included in that e-mail, right?

16 A It is.

17 Q You were also shown the next e-mail, DX1274, where
18 Mr. Panoff responded about 12 hours later to that e-mail
19 saying, "I'm okay with these," right?

20 A Yes.

21 Q You know Mr. Panoff wasn't working at the company in
22 April 2013, right?

23 A I don't know that.

24 Q Well, he couldn't have verified the accuracy of the
25 minutes for a time when he wasn't working at company, right?

Dooley - Cross - Kessler

10107

1 MS. DENERSTEIN: Objection.

2 THE COURT: Overruled. You can answer.

3 A I don't know that.

4 Q Moving on. You were shown DX1289, which is also in
5 binder three toward the front. You see this is an August 2013
6 e-mail between Mr. Richardson, Mr. Shkreli, Mr. Greebel and
7 Mr. Aselage about the Mike Smith employment agreement?

8 A Yes.

9 Q I'd like to show you another document marked for
10 identification as Government's Exhibit 1385.

11 MR. KESSLER: May I approach, your Honor?

12 THE COURT: Yes.

13 Q Do you have Government's Exhibit 1385 in front of you,
14 Mr. Dooley?

15 A I do.

16 Q Can you turn to the second page of the document and look
17 at the bottom e-mail, you see that's the same e-mail that's at
18 the bottom of Defense Exhibit 1289?

19 A Yes, it appears to be the same document.

20 Q Then there is another e-mail chain in Government's
21 Exhibit 1385 that is not the same as the e-mail chain in
22 Defense Exhibit 1289.

23 A Yes.

24 MR. KESSLER: Your Honor, I offer Government's
25 Exhibit 1385.

Dooley - Cross - Kessler

10108

1 MS. DENERSTEIN: No objection.

2 THE COURT: We receive in evidence Government's
3 Exhibit 1385.

4 (Government's Exhibit Number 1385 so marked and
5 received in evidence.)

6 Q Mr. Dooley I'm starting on the second page on the bottom,
7 you see there is an e-mail from Mr. Greebel to Mr. Shkreli
8 that says, "attached is a draft of Mike Smith's employment
9 agreement"?

10 A Yes.

11 Q That's the same e-mail that we saw on Defense Exhibit
12 1289, right?

13 A Yes.

14 Q Then there is e-mails back and forth between Mr. Shkreli
15 and Mr. Greebel and Mr. Panoff. And at the top of this second
16 page, July 31, 2013, 1:35 p.m. Mr. Shkreli writes, "Board
17 approval is not necessary for an 85K guy," do you see that?

18 A I do.

19 Q First page, Mr. Greebel responds on the bottom, "The
20 issue is the options not the cash portion." Do you see that?

21 A I do.

22 Q Mr. Shkreli says, "It's also a tiny amount who cares," do
23 you see that?

24 A I do.

25 Q Mr. Greebel writes, "The issue is giving out equity.

Dooley - Cross - Kessler

10109

1 Since there is no plan, equity grants are either approved by
2 the Board or the CEO is given blanket discretion up to a
3 certain number. I tried getting the latter for you, but
4 Richardson wanted the consultant to come in. We can send an
5 e-mail to the Board for a digital sign off to give you
6 discretion." Do you see that?

7 A I do.

8 Q Mr. Shkreli writes back, "Yeah that's stupid. I should
9 be able to hire people without at approving every single EA.
10 Whatever it takes, just do it," you see that?

11 A Yes.

12 Q Mr. Greebel sends this e-mail to Mr. Panoff, right?

13 A Yes.

14 Q You can set that aside.

15 Do you recall you were also shown some e-mails
16 related to someone named Andrew Vaino?

17 A Yes.

18 MR. KESSLER: May I approach?

19 THE COURT: Yes.

20 Could you identify what the exhibit is?

21 Q I've put in front of you several exhibits, Government's
22 Exhibit 1355, 1370, 1393, 1394, and 1395. Do you see those?

23 A I do.

24 MR. KESSLER: Your Honor, I offer all of these.

25 MS. DENERSTEIN: No objection, your Honor.

Dooley - Cross - Kessler

10110

1 THE COURT: All right. We receive in evidence
2 Government's Exhibit 1355, 1370, 1393, 1394 and 1395.

3 (Government's Exhibit Numbers 1355, 1370, 1393,
4 1394, and 1395 so marked and received in evidence.)

5 Q Let's start with 1355. You see on the bottom of this
6 e-mail chain there is an e-mail from Mr. Vaino to Scottrade
7 customer support on December 14, 2012?

8 A I do.

9 Q Mr. Vaino writes, "I'll be depositing stock certificates
10 for shares of DGTE on Monday morning at the Scottrade office
11 in Encinitas, California." Do you see that?

12 A I do.

13 Q Then the top e-mail is a reply from Scottrade customer
14 support to Mr. Vaino, "Dear Andrew, we have received your
15 document." Do you see that?

16 A I do.

17 Q Let's go to the next document, this Government's Exhibit
18 1370. You see this an e-mail chain January 2013 between
19 Mr. Shkreli, an e-mail address ending SFGNYC.com, George
20 Huang, Marek Biestek and eventually Mr. Vaino. Do you see all
21 those?

22 A Yes.

23 Q You testified on direct about the I believe December 31
24 e-mail where Mr. Vaino said, please use my Yahoo address going
25 forward, or words to that effect. Do you remember that?

Dooley - Cross - Kessler

10111

1 A I have to look at the document you're referring to to say
2 I did or did not.

3 Q You remember testifying about a couple of e-mails
4 relating to Mr. Vaino?

5 A I do.

6 Q One of them was December 2013 -- 2012, I'm sorry.

7 A I don't know that.

8 Q Okay. If you look at the bottom of this Government's
9 Exhibit 1370, you see Mr. Shkreli is forwarding a voicemail?

10 A I do.

11 Q In the next e-mail January 19, 2013, 8:17 p.m.
12 Mr. Shkreli writes, "SRPT forward new voicemail has been
13 received," that's the subject, right?

14 A Yes.

15 Q Mr. Shkreli writes to the e-mail address ending
16 SFGNYC.com, to George Huang and Marek Biestek, "Please take a
17 listen to my friend Peter Rheinstein's brief voicemail on
18 SRPT. Peter was one of the senior people at FDA for many
19 decades and has been my go-to guy for all things regulatory."

20 A Yes.

21 Q You understand FDA to be Food and Drug Administration?

22 A Yes.

23 Q Then Mr. Shkreli goes on, "He points out an interesting
24 thing here that I have not heard before, which is Sarepta will
25 likely have to do a bridging study to prove new large-scale

Dooley - Cross - Kessler

10112

1 product is equivalent to old, small-scale product. This won't
2 be a trivial thing because of the oligomer nature of the
3 product?" Do you see that.

4 A Yes, I do.

5 Q Sarepta is a company that works on Duchenne Muscular
6 Dystrophy drug?

7 A I don't.

8 Q If you look up Mr. Biestek forwards the e-mail I just
9 read to Mr. Vaino, right?

10 A Yes.

11 Q And Mr. Vaino writes back a long answer, which we'll get
12 to in a minute, do you see that?

13 A Yes.

14 Q Then Mr. Shkreli responds to both Mr. Vaino and
15 Mr. Biestek related to that long answer, right?

16 A Yes.

17 Q So let's read the first paragraph of Mr. Vaino's
18 response. "I think he's wrong on a requirement for a bridging
19 study. Eteplirsen is a 29 mer pseudo oligonucleoside, not a
20 biologic. The synthesis is entirely chemical, though strictly
21 all drugs are, and is accurately characterized with HPLC. If
22 even one of the 86 stereogenic centers is incorrect it will
23 affect the chromatogram. Is there a example of a non-biologic
24 that required a bridging study with the same chemical
25 composition?" Do you see that?

Dooley - Cross - Kessler

10113

1 A I do.

2 Q Fair to say Mr. Vaino is weighing in on a scientific
3 question?

4 MS. DENERSTEIN: Objection.

5 THE COURT: I would sustain the objection.

6 Q Before we go to the next e-mail related to Mr. Vaino, I
7 ask you to take a quick look at Defense Exhibit 104-97A, which
8 is towards the back of binder four. This is the Desert
9 Gateway 8K, correct?

10 A Yes.

11 Q December 12, 2012?

12 A Yes.

13 Q If you look at page six of the document you see there is
14 an overview of Retrophin?

15 A Yes.

16 Q If you look at this disclosure here, starting with, "Our
17 second development program is RE-024 a series of molecules
18 designed to treat PKAN. Our preclinical development, RE-024
19 is the being carried out with the St. Jude's Children Research
20 Hospital"?

21 A I do.

22 Q "We expect to file an IND for lead compound in the RE-024
23 program by 2014. Our third product in development in RE-001,
24 a modified protein intended to treat DMD." Do you see that?

25 A I do.

Dooley - Cross - Kessler

10114

1 Q DMD is Duchenne Muscular Dystrophy, right?

2 MS. DENERSTEIN: Objection.

3 THE COURT: Do you know, sir?

4 THE WITNESS: I do not.

5 Q To be clear, the second development program disclosed in
6 this December 12, 2012, program is the RE-024 molecule, which
7 is being developed in collaboration with St. Jude's, correct?

8 MS. DENERSTEIN: Objection.

9 A I don't know.

10 THE COURT: You can refrain the question, if you
11 would like, Mr. Kessler.

12 Q Let me try it this way. You see a reference to
13 St. Jude's, right?

14 A I do.

15 Q Now I'd like you to take -- strike that.

16 I'd like you to take a look at Government's Exhibit
17 1394, which is in the stack of papers I gave you. Do you have
18 that?

19 A I do.

20 Q You see Government's Exhibit 1394, is a February 14
21 e-mail chain between Martin Shkreli, Rouslan Michtenko and
22 Andrew Vaino?

23 A I do.

24 Q And so the bottom email Mr. Shkreli writes to
25 Mr. Michtenko, copying Mr. Vaino, "Hi Rouslan, I wanted to see

Dooley - Cross - Kessler

10115

1 if you can make compound two between 1.0 and 1.5 grams and
2 ship it to our partner St. Jude's in the next few weeks"?

3 A I do.

4 Q That was sent two months after the Desert Gateway 8K that
5 we just saw on December 12, 2012, correct?

6 A Yes.

7 Q Then Mr. Michtenko responds to Mr. Shkreli, again copying
8 Mr. Vaino, "Hi Martin, I'm traveling but will try to find out
9 if we can accommodate the synthesis as requested. Could you
10 or Andy please confirm the structure of the molecule to be on
11 the same page," do you see that?

12 A I do.

13 Q This e-mail is February 14, right?

14 A It is.

15 Q Take a look at Government's Exhibit 1393, also in your
16 pile. This is another e-mail chain from February 14, 2013,
17 right?

18 A Yes.

19 Q If we look at the bottom, there is an email from someone
20 named MichaelShuster@Fenwick.com to Martin Shkreli?

21 A Yes.

22 Q Fenwick is a law firm, right?

23 MS. DENERSTEIN: Objection.

24 THE COURT: If you know.

25 THE WITNESS: I don't know.

Dooley - Cross - Kessler

10116

1 Q You see Mr. Shuster's signature block there at the
2 bottom, Michael Shuster Fenwick and West LLP, do you see that?

3 A I do.

4 Q Then Mr. Shuster is described as partner, IP Group?

5 A I see that.

6 Q IP means intellectual property?

7 MS. DENERSTEIN: Objection.

8 THE COURT: If you know.

9 A I don't know.

10 Q You don't know?

11 MS. DENERSTEIN: Objection.

12 THE COURT: Asked and answered.

13 A It could mean a lot of things.

14 Q Okay. So you see that Mr. Shuster writes, "Martin, was
15 really fun to meet you today. Looking forward to working on a
16 first project with you. Probably best way to start would be
17 to get me a copy of provisional application." Do you see
18 that?

19 A Yes, I do.

20 Q Then Mr. Shkreli responds that It was nice to meet
21 Mr. Shuster. Then Mr. Shuster responds, "How would you
22 recommend we move forward on converting your provisional
23 application? Can I send a draft engagement letter to you?
24 Can you give me some info regarding the filed provisional?"
25 Do you see that?

Dooley - Cross - Kessler

10117

1 A I do.

2 Q Mr. Shkreli responds to Mr. Shuster copying Mr. Biestek
3 and Andrew Vaino using the Yahoo e-mail, do you see that?

4 A Yes.

5 Q Mr. Shkreli writes, "Sure you can send a draft EL. I
6 CCed a colleague who should be able to get you the rest." Do
7 you see that?

8 A I do.

9 Q Finally, I'd like you to take a look at Government's
10 Exhibit 1395.

11 A Yes.

12 Q You see on the bottom there is an e-mail from Marek
13 Biestek to Berge Minassian on February 25?

14 A Yes.

15 Q That copies Tom Fernandez, Michael Smith, Martin Shkreli,
16 and himself?

17 A Yes.

18 Q Then there is a discussion about something called Lafora
19 disease?

20 A Yes.

21 Q Mr. Biestek asked at end if there is a time convenient
22 for a call, do you see that?

23 A Yes.

24 Q Mr. Minassian responds, "Next Monday or Friday would be
25 good. Please arrange with my secretary." Do you see that?

Dooley - Cross - Kessler

10118

1 A I do.

2 Q On the top Mr. Biestek sends that e-mail to Mr. Vaino at
3 his Yahoo address, do you see that?

4 A Yes.

5 Q On February 25?

6 A Yes.

7 Q And he says, "Hey, would you join us on this call?" Do
8 you see that?

9 A I do.

10 Q I want to shift topics to something else you testified
11 about. I believe you testified about this next demonstrative
12 on your first day here, this is Defense Exhibit 5, do you
13 remember this?

14 A Yes.

15 Q This is a chart with a number of e-mails from different
16 people associated with MSMB Healthcare and MSMB Capital?

17 A I don't know who they are associated with.

18 Q You remember you read a number of these e-mails including
19 the bottom two, the one related to Schuyler Marshall and the
20 one related to David Geller?

21 A I read some e-mails, I don't know if those were
22 specifically read.

23 Q Do you recall reading an e-mail showing that Mr. Marshall
24 had been offered a settlement agreement before the e-mail you
25 read on this chart?

Dooley - Cross - Kessler

10119

1 A I don't recall that, counsel.

2 Q Do you recall reading an e-mail showing that Mr. Geller
3 had signed the settlement agreement before the e-mail you read
4 on this chart?

5 A If I could go to the exhibits, I don't know. I don't
6 know if I read that e-mail.

7 Q Okay. I next want to ask you about Defense Exhibit 7707,
8 which is in binder two. Have you found it?

9 A I have.

10 Q So this is a document you testified about on direct; is
11 that right?

12 A It could be, I testified about a lot of documents, a lot
13 of Board meetings, a lot of Board minutes, a lot of Board
14 e-mails.

15 Q So let's talk about this one. This is a July 23, 2013,
16 e-mail, do you see that?

17 A I do.

18 Q From Mr. Panoff to Martin Shkreli, Stephen Aselage,
19 Steven Richardson, right?

20 A Yes.

21 Q Copies Mr. Greebel, Mr. /KERT and Mr. Jain?

22 A Yes, it does.

23 Q This e-mail relates to a July Retrophin Board meeting,
24 right?

25 A Yes.

Dooley - Cross - Kessler

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1 Q If you turn to the second page of the document, you see
2 there is a letter there from Marcum to Mr. Shkreli and
3 Mr. Panoff?

4 A Yes.

5 Q This is an engagement letter of some sort?

6 A Yes.

7 Q Then if you flip ahead in the document to the page that
8 has Bates number 107168, do you see there is another
9 communication there to Retrophin?

10 A 107168, yes.

11 Q You understand this is another letter from Marcum to
12 Retrophin?

13 A I don't know that. There is no header on the document.

14 Q Okay. You see it begins, "In connection with our review
15 of the interim condensed consolidated financial statements of
16 Retrophin Inc. And subsidiary the company for the quarterly
17 period ended March 31, 2013," do you see that?

18 A I do.

19 Q If you go all the way ahead to the document, the page
20 where it's Bates stamp 174?

21 A Yes.

22 Q You see that's page seven of this letter signed, "Very
23 truly yours Marcum LLP Edward F. Hackert"?

24 A Yes.

25 Q You remember you read a letter, an excerpt, from Marcum

Dooley - Cross - Kessler

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1 to the Board later in time?

2 A I don't know if was later in time. I read a letter from
3 Marcum, when it was I don't recall, counsel.

4 Q You read in that letter from a significant unusual
5 transaction section as well, do you remember that? You read a
6 disclosure about settlement agreements?

7 A I read several disclosures of settlement agreements,
8 whether it was within the significant accounting policy
9 practices, I don't recall.

10 Q You see here there is number four, significant unusual
11 transactions on page 170?

12 A Yes, significant unusual transactions.

13 Q There is no discussion of settlement payments in this
14 July 23 letter from the auditor, is there, in this section?

15 A A discussion of settlement agreements?

16 Q Yes.

17 A No.

18 Q You can flip through the rest, if you want, but you'll
19 accept my representation there is no discussion of settlement
20 at any point in this seven-page letter?

21 A I don't know without looking through the whole document
22 to answer that question.

23 MR. KESSLER: Okay. I have no further questions.

24 THE COURT: Any redirect?

25 MS. DENERSTEIN: Very briefly, your Honor.

Dooley - Redirect - Denerstein

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1 REDIRECT EXAMINATION

2 BY MS. DENERSTEIN:

3 Q On exhibits 1395, 1293, 1394, 1373, 1370 Mr. Greebel is
4 not on any of these e-mails, is he?

5 A Not on 1395, not on 1393, not on 1394, not on 1355, not
6 on 1370.

7 Q Did you say 1373?

8 A 1373, there is no 1373. There is a 1393.

9 Q Is Mr. Vaino, are these -- is Mr. Vaino responding to any
10 of these e-mails, Government's Exhibit 1393?

11 A No, he's not.

12 Q And is he responding in Government's Exhibit 1395?

13 A No he's not.

14 Q Is he responding in Government's Exhibit 1394?

15 A No he's not.

16 Q And in Government's Exhibit 1370, he does respond,
17 correct?

18 A Yes, he does.

19 Q You don't have any idea what they are communicating about
20 in this e-mail, do you?

21 A I do not.

22 Q With respect to Government's Exhibit 1385, if we just
23 pull that up. In the e-mail from Mr. Greebel to Mr. Panoff
24 and Mr. Shkreli at 10:57 a.m., what does Mr. Greebel state
25 about Board approval? The e-mail begins with, "Yes, I'm

Dooley - Redirect - Denerstein

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1 working on that."

2 It might be easier to look at the computer.

3 A I have it.

4 Q Bates number 081.

5 A I have it. 10:57 a.m. from Evan Greebel to Martin
6 Shkreli and Marc Panoff re: Mike Smith employment agreement.
7 "Yes, I am working on that and will provide. The royalty
8 agreement will need to be approved by the Board. Since you
9 are awarding Mike options, I suggest you have the Board sign
10 off on his employment agreement since the comp seven
11 consultant has not delivered the report yet."

12 Q So this e-mail is dated July 31, 2013, correct?

13 A Yes.

14 Q Let's go to Defense Exhibit 1,289. If we go to the
15 bottom, it's an e-mail chain about Mike Smith's employment
16 agreement, right?

17 A Yes.

18 Q If we go to the e-mail at August 13, 2013, from
19 Mr. Greebel at 9:50 a.m.?

20 A Yes.

21 Q Is this dated later than the e-mail exchange in
22 Government's Exhibit 1,385?

23 A Yes, it is.

24 Q What is the date of the e-mail in Government's Exhibit
25 1,385?

Dooley - Redirect - Denerstein

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1 A July 31, 2013.

2 Q What is the date of this e-mail in August 13, 2013 --
3 what is the date in this e-mail between Mr. Greebel and
4 Mr. Shkreli?

5 A August 13, 2013.

6 Q And is Mr. Greebel stating that the option portion needs
7 to be approved by the Board?

8 A That's what stated in the e-mail.

9 MS. DENERSTEIN: I don't have any further questions.

10 MR. KESSLER: Nothing further.

11 THE COURT: Sir, you're excused. Thank you, have a
12 nice day.

13 (Whereupon, the witness was excused.)

14 MR. BRODSKY: Your Honor, with the exception of
15 reserving on some exhibits that we're conferring with the
16 Government on, the defense rests.

17 THE COURT: All right. Well, let me then advise the
18 jurors where we are because I know you must be wondering.

19 The defense has rested. And we anticipate that you
20 will be charged with the instructions and will be deliberating
21 by the end of this week. What comes next are closing
22 arguments or summations.

23 You are free to deliberate as long as you deem
24 necessary. This has been a long trial, and there is a lot of
25 evidence before you. In the event that you're deliberations

Dooley - Redirect - Denerstein

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1 are not completed by this Friday, December 22, we anticipate
2 returning to court so that you can resume your deliberations
3 on Tuesday, December 26, following the Christmas holiday.
4 With the exception of New Year's Day on Monday, January 1st,
5 the court will sit each day until you have completed your
6 deliberations.

7 If you have any scheduling conflicts, please advise
8 Ms. Jackson as soon as possible so that we can plan
9 accordingly.

10 So as I said, tomorrow summations, I'll charge you
11 with the instructions, and you may commence your
12 deliberations. We believe that can happen before the end of
13 this week, all of that.

14 But again, we don't want the jury to feel rushed in
15 deliberations. There is a lot of material and so we will be
16 available for you to sit and continue deliberations next week
17 starting next Tuesday. If that presents an issue, when we
18 dismiss you for the day, please let Ms. Jackson know the
19 nature of your conflict, if there is one. We hope there won't
20 be, but if there is, for example, travel plans or other issues
21 let her know the nature of your any issues. All right.

22 With that we are prepared to adjourn for the
23 evening. I want to thank you very much for your attention.
24 Tomorrow you will hear summations.

25 And in the meantime, please remain open minded,

Dooley - Redirect - Denerstein

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1 don't expose yourself to any media deliberately, avoid any
2 media coverage, don't talk about the case with anyone
3 including your family members and each other. The time for
4 you to talk about the case with each other is not going to
5 occur until after you hear the charges, the instructions.

6 Thank you very much. We'll see you tomorrow
7 morning. Please be prepared to start at 9:00 o'clock. So if
8 you're here at 9:00 and you're all present, we'll start with
9 the summations. Thank you. Have a good night.

10 (Jury exits the courtroom.)
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1 (In open court; outside the presence of the jury.)

2 THE COURT: Have a seat.

3 So in terms of the exhibits that are a little bit
4 jumbled up, did the parties propose to read a stipulation or
5 are you going to read into the record what we discussed in
6 terms of agreement to admit but not for the truth or how do
7 you propose to close the loop?

8 MR. KESSLER: Let us confer and we will have a
9 proposal.

10 THE COURT: Do you expect we will start summing up
11 tomorrow morning?

12 MS. SMITH: Yes, Your Honor.

13 THE COURT: All right. Do we have a rough
14 estimate about timing and is the Government going to reserve
15 rebuttal time.

16 MS. SMITH: Yes, the Government's going to reserve
17 rebuttal time. I just want to put on the record since the
18 defense has rested it's apparent that the defendant has made
19 the decision not to testify.

20 THE COURT: All right.

21 MS. SMITH: And then in terms of the closing
22 argument.

23 THE COURT: Well, let me just advise Mr. Greebel.
24 Sir, as you know, it is your right to testify and it is also
25 your right not to testify. I will be instructing the jury

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1 that because you have chosen not to testify, they may not
2 hold that against you and I will also instruct them that
3 they cannot discuss that fact in their deliberations.

4 I just want to be sure, Mr. Greebel, that you
5 understand that you do have the right both to testify if you
6 choose to do so and also not to testify.

7 Do you understand that right, sir?

8 THE DEFENDANT: Yes, Your Honor.

9 THE COURT: And have you discussed this decision
10 with your attorneys?

11 THE DEFENDANT: Yes, Your Honor.

12 THE COURT: All right. Thank you. And have any
13 threats or promises been made to you that let to your
14 decision not to testify here today?

15 THE DEFENDANT: No, Your Honor.

16 THE COURT: All right. Thank you.

17 Ms. Smith, I'll hear from you now.

18 MS. SMITH: In terms of timing, obviously it is
19 always per the Judge. The Government estimates that its
20 closing argument will be approximately three hours, maybe a
21 little bit longer than that. So hopefully we can get
22 started first thing in the morning, that with the
23 mid-morning break I will be done by the lunch break. That
24 is kind of the goal.

25 THE COURT: And the defense?

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1 MR. BRODSKY: Your Honor, we have not fully run
2 through our summation. We are still working on it.

3 THE COURT: Well, can you give me a rough
4 estimate, please.

5 MR. BRODSKY: I believe it will be longer than
6 three hours, Your Honor, and I will have a better estimate
7 tomorrow morning if Your Honor needs a more exact.

8 THE COURT: All right.

9 MR. BRODSKY: But we will be longer than three
10 hours.

11 THE COURT: All right. Then you will be prepared
12 the start --

13 MR. BRODSKY: Oh yes.

14 THE COURT: -- even if you have to go into the
15 next day.

16 MR. BRODSKY: Oh, yes, Your Honor.

17 THE COURT: Okay.

18 MR. BRODSKY: We would like --

19 THE COURT: Okay.

20 MR. BRODSKY: -- to proceed.

21 THE COURT: All right. And I guess does the
22 Government have any idea about any rebuttal argument?

23 MR. PITLUCK: Your Honor, it 100 percent depends
24 on the scope --

25 THE COURT: I see.

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1 MR. PITLUCK: -- of closing.

2 THE COURT: All right.

3 I thought what I might do is just check with
4 Ms. Jackson, see if she got any strong push back on the
5 jurors. No?

6 All right.

7 MR. DUBIN: Your Honor, we just want to get a
8 little bit of guidance from you.

9 THE COURT: They will be available next week.

10 MR. DUBIN: We plan, because we have a long
11 summation and we are going to be covering a lot of different
12 stuff. Mr. Brodsky and I plan to split it with me doing the
13 first hopefully first just 2 hours and then doing the back
14 end. We will be covering different subject matter.

15 So I just wanted a little bit of guidance from
16 Your Honor on one thing. There have been different -- when
17 the Government has raised an objection, and the answer was
18 not struck or the question was not struck and Your Honor
19 then directed a witness to answer the question yes or no, is
20 Your Honor comfortable with, you know, us reading this
21 portion of the transcript where you have directed a witness
22 to answer yes or no.

23 THE COURT: Typically, the rulings of the Court
24 should be disregarded if the objection is sustained, right?

25 MR. DUBIN: Correct.

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1 THE COURT: Both the questions, the answers and
2 the rulings should be disregarded.

3 If I have given specific direction to answer yes
4 or no to a witness, I suppose it makes sense to give that
5 answer context.

6 MR. DUBIN: Yeah. I am just talking about --

7 THE COURT: I am just not sure how --

8 MR. DUBIN: Yes. Let me give you a better
9 example. Just an example where there was not an objection
10 sustained and there was an instance where Your Honor said --
11 there was an objection and then Your Honor said to the
12 witness, you know, the question calls for a yes or no
13 response, can you just answer yes or no.

14 That was it.

15 THE COURT: All right. Is there any issue that
16 the Government has with Mr. Dubin reading that part of the
17 transcript?

18 MS. SMITH: I think it may depend on a
19 case-by-case basis. Generally that is not done. I don't
20 know why --

21 THE COURT: I have never had that done.

22 MS. SMITH: Especially if the question was asked
23 as a yes or no, I don't know why they Court's additional
24 instruction should be included just like any other Court
25 ruling.

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1 THE COURT: Well, I guess the only issue, we do
2 not usually read --

3 MS. SMITH: The instruction --

4 THE COURT: I do not usually have anyone read from
5 the transcript in the trial unless it is more substantive.

6 MR. DUBIN: Do you mean during --

7 THE COURT: Yes, during summations.

8 But if the answer is a yes-or-no answer, and that
9 context is important for the witness' answer so that, you
10 know, the jury heard the instruction.

11 MR. DUBIN: I understand, Your Honor.

12 THE COURT: I suppose given the length of the
13 trial it would not hurt to refresh them.

14 MS. SMITH: Your Honor, I think if the question is
15 a yes-or-no question, then the Court's additional
16 instruction is unnecessary. In fact, the Court's
17 instruction, jury instructions say, you know, sustained
18 objections, you know, how the objections themselves should
19 not be included. So I suppose I can see a situation where
20 if it is not a yes-or-no question because the question was
21 not asked clearly, that may provide additional context but
22 if it is a yes-or-no question, the witness did not answer
23 yes or no, it was struck and then the Court instructed them
24 to answer yes or no, I do not know why that back and forth
25 would not be struck as any other objection, sustained

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1 objection.

2 THE COURT: All right. And I am just trying to
3 envision, I think that came up during Agent Delzotto's
4 testimony.

5 MR. DUBIN: Yes, among others.

6 THE COURT: Where the response was not yes or no
7 and there was a request that I strike the answer and direct
8 the witness to answer yes or no?

9 MR. DUBIN: Correct.

10 THE COURT: So in that regard, what is important
11 is what the witness answered, whether it was yes or no and
12 not all the intervening.

13 MR. DUBIN: Okay. I understand.

14 THE COURT: Because if something was stricken, I
15 do not know why --

16 MR. DUBIN: It wasn't stricken.

17 THE COURT: Oh okay.

18 MR. DUBIN: It was just an instance where there
19 was nothing stricken, it was just a directive to him to
20 answer yes or no.

21 THE COURT: Because you objected that he was not
22 answering yes or no?

23 MR. DUBIN: I will have to go back and look.

24 THE COURT: I mean, it is hard for me to --

25 MR. DUBIN: I understand.

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1 THE COURT: -- to visualize what my --

2 MR. DUBIN: I might --

3 THE COURT: I would prefer that we try to stick as
4 much to what the evidence is.

5 MR. DUBIN: I think it would probably be more
6 appropriate in that instance, then, just to avoid the
7 problem just read the questions and answers and take out
8 Your Honor's comments.

9 That is what I will do.

10 THE COURT: All right. Well, if there's an
11 objection by a lawyer to the answer.

12 MR. DUBIN: But in an instance where you did not
13 rule on the objection, you just directed the witness. So
14 the objection just -- I think the way Your Honor dealt with
15 it in certain instances, not just with Special Agent
16 Delzotto but with various witnesses where, you know, if you
17 did not sustain the objection or overrule it, you might have
18 just turned to the witness perfectly, you know, appropriate
19 and in the flow of the questioning and say, can you just
20 answer it yes or no, and then they either would or would
21 not? But in an abundance of caution, I will just leave
22 Your Honor's comments out.

23 THE COURT: I think what happened in some
24 instances is the objection came after the answer, or if
25 there was an objection before I could rule, the question

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1 would be rephrased and then the answer would be
2 forthcoming --

3 MR. DUBIN: Okay.

4 THE COURT: -- without an objection. I just do
5 not know in a vacuum what exactly is at issue but...

6 MR. DUBIN: That is why I will just err on the
7 side of caution and just leave Your Honor's comments out.

8 THE COURT: All right. Unless they are important
9 to understand the answer.

10 MR. DUBIN: Okay.

11 THE COURT: But I do not know exactly what you are
12 referring to.

13 MR. DUBIN: Okay.

14 THE COURT: So would you be putting it up on the
15 Elmo or up on the screen?

16 MR. DUBIN: We intend to put testimony.

17 THE COURT: All right. So if you do that --

18 MR. DUBIN: We will make sure we take out,
19 Your Honor's comments.

20 THE COURT: All right. What I would like to avoid
21 is either jumping up and objecting in the middle of
22 someone's closing.

23 MR. DUBIN: Yes, Your Honor.

24 THE COURT: But if it is appropriate, certainly.
25 If it mischaracterizes the evidence or if it goes into areas

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1 that I directed the parties not to go into and there was an
2 objection, then it will be sustained.

3 MR. DUBIN: Okay.

4 MS. SMITH: And, Your Honor, we are just going to
5 review the transcript tonight. There were a couple of
6 rulings about how documents or areas could be argued or not
7 argued in summation and if we have any remaining questions
8 after reviewing the transcript we will just raise them
9 tomorrow morning.

10 THE COURT: All right. It would be nice if you
11 could raise them with the defense team so you could
12 hopefully come to --

13 MS. SMITH: We can try.

14 THE COURT: -- some agreement.

15 MS. SMITH: Absolutely.

16 MR. BRODSKY: Your Honor, just as a comment and it
17 sounds like they have things in mind to read it tomorrow on
18 the day of summation which would require us changing our
19 summation just doesn't seem right. If they have some
20 oblique reference to some issue that they think they do not
21 want us to say during summation, they really should inform
22 us by tonight so we could address it in our summation. The
23 last thing we want to do is hear about it tomorrow morning
24 and then have to somehow adapt so some position they are
25 taking which Your Honor accepts.

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1 MS. SMITH: Your Honor, we are happy to confer
2 right now and see if there are any issues.

3 I just have not had a chance to go through the
4 transcript. We were not sure exactly when we would finish,
5 but we are happy to take a couple of minutes and do that
6 right now.

7 MR. DUBIN: We can hang around.

8 THE COURT: Did you want me to hang around too and
9 make rulings?

10 MR. CHAN: Your Honor, if there is a chance, I
11 would like to talk about the most recent version of the
12 charge.

13 THE COURT: If you are talking about another --
14 all right I will hear from you but I am not going to rehash
15 old rulings if that is what --

16 MR. CHAN: Well, some of them related to things
17 that we have not argued yet because we only submitted things
18 in writing. Some of them are not related to things we
19 submitted over the weekend and we have not argued to the
20 Court yet so I wanted to just --

21 THE COURT: Well, you do not get to argue on
22 everything. Okay?

23 MR. CHAN: That is fine. I am just asking if we
24 can. If we can't, we can't.

25 THE COURT: What did you want to argue about?

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1 Mr. Chan, just give me the subject and I will decide whether
2 or not I will hear argument.

3 MR. CHAN: Okay. The first is with respect to
4 Page 50 of the black line that was just circulated, which is
5 the respect of the duty language. I had understood from our
6 prior conferences that the Court was not going to include
7 the language about the duty applicable to corporate
8 officers.

9 THE COURT: I was going to do it but make clear
10 that it wasn't applicable to Mr. Greebel.

11 MR. CHAN: Well, so my question is why is it in
12 there? If it is not a basis for liability in this case,
13 then why do we have the instruction?

14 THE COURT: Because the Government made the
15 argument that Mr. Shkreli had a duty in the capacity as a
16 corporate officer. And the duty to disclose ran Mr. Shkreli
17 with regard to his duty as an officer and the Government
18 viewed that the duty of disclosure runs separately to
19 Mr. Greebel in his capacity as an attorney and fiduciary
20 relationship with Retrophin.

21 So the idea was to advise the jury that there were
22 two duties, separate duties, that would have obligated them
23 to disclose certain information.

24 MR. CHAN: Yeah. And I thought from our
25 conference that the Court had ruled that the Government can

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1 proceed on this later theory, which is the theory that
2 because Mr. Shkreli owed a duty of loyalty to the company
3 that Mr. Greebel could be liable for any omission made by
4 Mr. Shkreli.

5 THE COURT: I think we stated in the Charge that
6 Mr. Greebel could not be held liable for Mr. Shkreli's
7 violation of the duty. I mean, I do not have it right now
8 with me so...

9 MR. CHAN: Okay.

10 THE COURT: What else do you have a problem with?

11 MR. CHAN: So I understood that to be allowing for
12 the possibility but if the Court is saying it is not going
13 to allow for that then I do not have an issue.

14 THE COURT: I am sorry if what?

15 MR. CHAN: I thought the Court was saying exactly
16 what you just said just now, which is that Mr. Greebel could
17 not be liable for the omissions of Mr. Shkreli's duty,
18 right? But I read the current language as allowing for that
19 possibility, which is why I am raising this.

20 If the Court is saying that, yes, you are adhering
21 to what I thought was your prior ruling that that secondary
22 basis of liability could not be a basis, then I do not
23 have an issue. So I was asking if the Court was rethinking
24 its prior ruling.

25 THE COURT: Was there language in that instruction

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1 or language that is not in that instruction that is
2 different from what we discussed previously?

3 MR. CHAN: Yeah, because it merely says that there
4 is this other duty that belongs to Mr. Shkreli and that is
5 it. It doesn't limit the basis for which the jury can
6 consider that duty in respect of Mr. Greebel's liability.
7 And I thought that that silence was on purpose by the Court
8 to leave open the possibility for the jury to find that as a
9 grounds for Mr. Greebel's violation of any omission.

10 THE COURT: It is intended to discuss the two
11 separate duties vis-à-vis their separate submission. CHECK
12 ON CHECK ON.

13 MR. CHAN: True but I think it does now, it leaves
14 open for the jury to find Mr. Greebel guilty on Count 1
15 based on omissions made by Mr. Shkreli that violate
16 Mr. Shkreli's duty of loyalty as an officer, which is a
17 possibility that I thought we had argued in the prior
18 conferences that the Government was not going to be allowed
19 to argue.

20 THE COURT: Yeah, I do not think they are going
21 it. Are you, Mr. Pitluck? I think --

22 MR. PITLUCK: Your Honor, I think it is an
23 inaccurate statement of the law. My recollection of the
24 conference was that we could not inject Martin Shkreli's
25 duty of loyalty attributed to Evan Greebel's knowledge which

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1 we are not going to do. We think the proposed Charge as
2 given makes clear who has what duty in this very specific
3 context and that is arguing an accurate statement of the
4 law.

5 THE COURT: I guess the question is whether there
6 would be an objection if there was language added. Is that
7 what you are advocating, Mr. Chan?

8 MR. CHAN: Yeah.

9 THE COURT: The jury may not find Mr. Greebel
10 guilty if they find that Mr. Shkreli did not abide by or
11 perform his duty as a corporate officer.

12 MR. CHAN: Yes, Your Honor, that is what I would
13 ask.

14 THE COURT: Which I think is what would be an
15 appropriate clarification.

16 MR. KESSLER: I think that is accurate. But it is
17 also the case that Mr. Shkreli's conduct is certainly
18 evident of Mr. Greebel's mind-set, his actions, that sort of
19 thing.

20 THE COURT: Right. But that is a different
21 statement. You are saying that you can consider this
22 evidence versus you may not find Mr. Greebel guilty on the
23 basis of a finding.

24 MR. CHAN: And I think if the Court limits it to
25 this language to the narrow version that you originally

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1 proposed about --

2 MR. KESSLER: Sorry. We are talking through the
3 difference between a conspiracy and a substantive charge.

4 THE COURT: No. I understand you have made that
5 argument before.

6 MR. KESSLER: It is correct that, you know, if
7 Mr. Shkreli committed wire fraud, substantive wire fraud,
8 that might or might not help prove the conspiracy against
9 Mr. Greebel. But Mr. Shkreli committing wire fraud would
10 not in itself make Mr. Greebel guilty of the conspiracy. I
11 think that is the difference we are teasing out.

12 Does that make sense?

13 THE COURT: Well, the question I have for you is
14 whether you would object to adding a clarifying sentence
15 that the jury may not find Evan Greebel guilty on the
16 grounds that Mr. Shkreli violated his duty as an officer or
17 director of Retrophin.

18 MR. PITLUCK: Judge, I think that is actually
19 legally inaccurate in a conspiracy charge. I think that
20 confuses it more than currently which has, makes it very
21 clear what Mr. Greebel's specific duty is.

22 MR. CHAN: Well, I disagree. I think that adding
23 the language about the separate corporate duty leaves us
24 hanging Chad basically what that means for the jury's
25 deliberations and I disagree that it is actually the law.

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1 We have not found a case where that can be so in the context
2 of a wire fraud conspiracy, although *Wolson* aside as a
3 substantive case where the defendant was alleged to have
4 caused the duty violation of the officer and that is not the
5 case here.

6 THE COURT: All right.

7 So you have no objections; is that right?

8 MR. PITLUCK: Well, Judge we do have an objection.
9 We do think it is not legally accurate that a person
10 cannot be convicted because a co-conspirator violated their
11 fiduciary duty. Now, we are obviously limited to language
12 that is charged here. We are not going to allege that
13 Mr. Greebel had the fiduciary duty as an officer or director
14 which is what the Court clearly instructs.

15 THE COURT: Isn't there language in there that
16 says he is not an officer.

17 MR. PITLUCK: Yeah, there is, absolutely.

18 THE COURT: Okay.

19 MR. CHAN: But it doesn't say that he can't be
20 liable for the duties, violation of duties by Mr. Shkreli
21 who is an officer.

22 THE COURT: You know, my clerk just confirmed what
23 I was recalling that the Government did, in fact, argue that
24 Mr. Greebel could be found guilty if he conspired with
25 Mr. Shkreli or Mr. Shkreli to violate his duty to Retrophin.

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1 MR. PITLUCK: That is right, Judge, because it is
2 a conspiracy.

3 THE COURT: Right, right.

4 MR. CHAN: They argue that but I thought
5 Your Honor had denied that application.

6 THE COURT: Well, I want to keep it clear and I do
7 not want the jury to make mistakes about considering
8 Mr. Greebel's culpability based on a duty that they find was
9 violated by Mr. Shkreli. The only way he could be liable
10 would be if he conspired or directed Mr. Shkreli to violate
11 his duty i.e., do not disclose to the Board.

12 I mean, I -- look --

13 MR. PITLUCK: Your Honor, I think the affirmative
14 instruction that you cannot find him liable if he did, is
15 incorrect.

16 THE COURT: Well, I think it is not aided and
17 abetted. I am just saying you cannot find him guilty on the
18 ground that Mr. Shkreli violates his duty as an officer or
19 director of Retrophin. The word aiding and abetting is not
20 in there and so, you know, it is a conspiracy charge. But I
21 just wanted them to be clear that in order to find
22 Mr. Greebel guilty based on Mr. Shkreli's violation of his
23 corporate duty to Retrophin as an officer or director, it
24 would require an intentional knowing agreement by
25 Mr. Greebel to encourage Mr. Shkreli or to agree with him

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1 that he would violate his corporate duty.

2 MR. PITLUCK: Judge, I think it is thoroughly
3 confusing that way. If the Court's inclined to raise the
4 duty and say you cannot find this based on the duty our
5 prefer would be to take out the duty of both the duty of
6 loyalty.

7 THE COURT: Take out Mr. Shkreli's duty
8 completely?

9 MR. PITLUCK: Even though it should be in there
10 Judge. Because obviously violation of the duty is not an
11 element of the Charge.

12 THE COURT: Right.

13 MR. PITLUCK: I think the Court may that
14 abundantly clear.

15 So if the Court is holding, I think, counter to
16 what we have argued then I think counter to the applicable
17 law on conspiracy, that Mr. Greebel cannot be convicted
18 based on Mr. Shkreli's violation of his duty, then there's
19 really no reason to have the duty in there at all. It is
20 just surplusage to put something up and then say something
21 that is unrelated to it to undercut it.

22 So if that is the Court's inclination, we think
23 that is an accurate statement of the law and it has been
24 given in a number of conspiracy and wire fraud instructions,
25 but if the Court is inclined to add that based on our

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1 argument, then we would just request that that paragraph be
2 taken out.

3 MR. CHAN: Well --

4 THE COURT: I would have to look at what we got
5 because I do not have a copy here and I am not appreciative
6 of this because we spent hours and days and hours and days.

7 MR. CHAN: Your Honor, the only reason I raise
8 because I thought the Court ruled the opposite.

9 THE COURT: Stop interrupting me, Mr. Chan. I am
10 sick and tired of it. Seriously tired of it. All of you.
11 It is constantly.

12 I mean, we have stayed here as long as I was
13 willing to stay here late into the night and the only reason
14 we adjourned is because somebody had to leave. And now you
15 are telling me on the eve of closing, on the eve of charging
16 that there is an issue.

17 I tried many times to have the charging conference
18 between the parties but there is always something and we
19 stopped and now here we are. And you are complaining you
20 could not argue it. I just really think this record, your
21 characterization is dishonest and inaccurate and I do not
22 accept it.

23 MR. CHAN: Your Honor, I think it is wrong to say
24 that I am being is dishonest.

25 THE COURT: Not you, I am saying the

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1 characterization you do not have a chance the argue it is
2 dishonest and not inaccurate.

3 MR. CHAN: I did not say about this one I did not
4 get a chance to argue, I raised this one because I thought
5 the Court had ruled the opposite which is the only reason I
6 am raising it now owed because I was confused as to why if
7 the Court ruled the opposite the last time we met it is now
8 appearing in the language that we did not expect to see.

9 THE COURT: I am just going to excuse myself and
10 go get a copy. I do not -- okay.

11 MR. CHAN: I have an additional copy if you want
12 to use it as a copy.

13 THE COURT: All right. Thank you.

14 MR. CHAN: So I think that the Government's
15 proposal as a solution, I agree with them is the solution.

16 THE COURT: All right.

17 MR. CHAN: Which would be to just delete the
18 paragraph starting There is no such duty, and then the
19 second paragraph would stay in except for the clause With
20 regard would come out and is that sentence would just start
21 In order.

22 THE COURT: In order?

23 MR. CHAN: Yes. In order for a failure to
24 disclose material information.

25 THE COURT: Is there any disagreement with that

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1 change, Counsel for the Government?

2 MR. PITLUCK: There is, Judge, because there is a
3 reference in the paragraph above to the fiduciary duty such
4 as the attorney/client relationship. The paragraph that is
5 staying in.

6 MR. CHAN: Well, then fine, we could just delete
7 Or the duty of loyalty from the first clause. Saying with
8 regard to fiduciary duty comma.

9 MR. PITLUCK: That is fine.

10 THE COURT: All right.

11 What else?

12 MR. CHAN: And with respect to the -- this goes to
13 Page 55 now and going to Page 55 with respect to the
14 instructions on Dr. Rosenfeld, I respectfully suggest that
15 the language that the Court added at the end of the
16 Rosenfeld instruction which said, the arbitration decision
17 does bind you in any way. As I have previously stated you,
18 the jury, are solely responsible for finding the facts in
19 this case based solely on the evidence at this trial. I
20 think that that leaves open for the jury to conclude that
21 that the Rosenfeld consulting agreement was a sham
22 consulting agreement even though the Government said and the
23 Court instructs here that the Rosenfeld consulting agreement
24 is not a sham consulting agreement. So I would suggest
25 taking out those last two sentences.

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1 MR. KESSLER: Your Honor, it is not misleading in
2 any way. Three sentences earlier Court said the Government
3 does not allege in with Count 1 that Dr. Rosenfeld's
4 consulting agreement and release defrauded Retrophin. There
5 is absolutely nothing confusing at all. The Court's
6 instruction is valid. We made submissions about those.

7 MR. CHAN: But if the arbitration decision is not
8 to be used to be based by the jury as a basis for finding
9 the consulting agreement was a sham, then there is in fact
10 finding for them to do on the basis of the arbitration
11 decision.

12 THE COURT: Well, the thing is when the
13 arbitration decision was introduced, Dr. Rosenfeld was
14 walked through each particular section of the agreement.
15 And my concern is that the jury would be found or feel bound
16 that they had to make the same findings. And this really
17 was introduced solely because it was defining the party
18 i.e., Retrophin owed Dr. Rosenfeld money for his consulting
19 and Dr. Rosenfeld provided it was not an agreement where
20 he was not owed. And my concern is that juries often get
21 confused, so for example, in a discrimination case they see
22 an EEO decision they feel that they have to be bound by that
23 decision. And this was made clear that the issues in this
24 trial are different. I believe we took out language in the
25 arbitration agreement that issues regarding criminal

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1 liability involving specific individuals was not for the
2 arbitrator and that that was decided in a different forum
3 and I think that, you know, this is just telling the jury
4 look, that was one decision and here you have a different
5 decision to make.

6 And by the way, we have been very clear that
7 the Government does not allege that the Rosenfeld
8 arbitration is a sham. But I was concerned that because
9 Dr. Rosenfeld had been walked through on direct in detail
10 every single, virtually every single page in that
11 arbitration decision that they needed to realize that they
12 have a duty to find facts in this trial and not simply say,
13 well, the arbitrator found X, so we should all define this,
14 whatever that can X may be.

15 MR. CHAN: Okay. Understood.

16 The last one I want to raise is the next one on
17 the same, Page 56, concerning the backdating transcripts.
18 So here we would ask that the Court -- the Court did not add
19 the language that we had proposed where it informs the jury
20 that the backdating theory was dismissed. We would ask the
21 Court to apprise the jury of that in these instructions.
22 Right now it just says that the Government does not allege.
23 As the Court obviously knows the Government did allege and
24 that allegation has been dismissed.

25 I note that throughout our jury conferences some

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1 of the Government fallback position had been that the model
2 Sand instructions should control, the model Sand instruction
3 as to when particular counts are dismissed have the Court
4 informing the jury of the fact that the dismissal, and so we
5 would ask the same here.

6 MR. KESSLER: Your Honor, we submitted written
7 suggestions, the Court considered them. There is nothing
8 wrong with the Court's Charge. We should stick with it and
9 as we said about 27 times, there is nothing to dismiss.
10 There is one Count. It is the same Count. We are not
11 advancing one argument related to that Count which the Court
12 makes clear. There is nothing to tell the jury they have
13 got to dismiss.

14 THE COURT: That is the concern. I do not think
15 it is accurate to say something was dismissed.

16 The Count remains. One theory of exposure under
17 that Count has been withdrawn. It is not going to be
18 proffered. It is not something the Government is going to
19 argue. And do not forget we are not reading the indictment,
20 the entire indictment, the different schemes to the jury.
21 They are not getting the indictment and they may not even
22 know what this is. I mean, my concern was I know you had
23 proposed the backdating scheme. We just did not see that
24 anywhere in the record. I think that was something we
25 discussed at sidebar or in bench conferences but it wasn't

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1 something that the jurors heard called the backdating
2 scheme. There was testimony about backdating documents and
3 whether that was okay under the circumstances for which that
4 was done. But it has never been, you know, it is not an
5 indictment. It is not going to be described to the jury in
6 my Charges and the Government's simply not going to be
7 arguing to the jury about it.

8 MR. CHAN: Well, I think the only difference in
9 this case is that they opened on -- they might have not
10 called it uses the word the backdating scheme.

11 THE COURT: They did not.

12 MR. CHAN: But in their opening statement -- no,
13 no, no I agree with that.

14 But in the opening statement it was clear that
15 that talked about three manners in which Count 1 was
16 violated. And so by saying here that the Government does
17 not the allege, although currently true, it was not true at
18 the beginning of this trial.

19 MR. KESSLER: Your Honor, we went through the
20 opening the last time. There is no allegation that there is
21 three different plans. There is a story. It was
22 chronological; first thing happens, second thing happens,
23 third thing happens. We are over this. We went over this
24 in a prior conference. There is just nothing more to
25 address. The Court's Charge is correct.

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1 MR. BRODSKY: The only other issue, Your Honor, I
2 would point out is that we did open with three theories,
3 prosecution based on what the Government had told us prior
4 to trial. We did open that way. We called it backdating.
5 We then went through settlements and consulting agreement we
6 did that based on the representation the Government made and
7 what they were going to prove. And so we opened that way,
8 the jury heard it they way. And for them to just say, oh,
9 we are not alleging it, we have to be able to say they
10 alleged it, they are withdrawing it, and otherwise,
11 Your Honor, it was completely misleading to us, leading us
12 to open in a certain way.

13 MR. PITLUCK: Your Honor, we respectfully
14 disagree. This is the night before the close. We want to
15 work on this. We think the Charge language is entirely
16 accurate and considered by the Court and --

17 THE COURT: We tried to look through the entire
18 transcript. We did word searches for this backdating and,
19 you know, to the extent there was a story in the opening by
20 the Government and the defense gave their view of that story
21 and what they thought the evidence would show. I do not
22 think the jury has it in their head that this is a separate
23 basis on which the Government seeks to find -- strike that.

24 I do not believe that the jury has been told that
25 they can or should find Mr. Greebel guilty based on the

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1 theory of the backdating. It was a narrative of the
2 evidence and what is clear in this instruction is that they
3 cannot find him guilty based on those transcripts.

4 And, in fact, I think this is almost too general
5 and too broad because there has been a lot of evidence about
6 transfers in so many different contexts and a lot of you got
7 transferred shares.

8 The Fearnow shares were transferred around. But
9 this is within, I think we should say Count 1, right? And
10 it does say you cannot find Mr. Greebel guilty of Count 1
11 solely on the basis of evidence about these transfers. That
12 is about as close as I can get without calling it the
13 backdating scheme which is not, again, in the record.

14 MR. CHAN: Very well, Your Honor. Thank you for
15 hearing us.

16 MR. PITLUCK: Thank you.

17 MR. KESSLER: Thank you.

18 THE COURT: Have a nice night.

19 MR. KESSLER: You too.

20 (Pause in proceedings.)

21 THE COURT: All right.

22 MR. PITLUCK: So, Your Honor, I apologize for
23 coming back. I hope this is very brief, but we have
24 conferred and there are two issues that the Government
25 believes the Court has ruled on related to arguments that

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1 can be made at closing. We have conferred, it seems we have
2 a difference of view. We wanted to raise them to the Court.
3 The first is the rush to judgment issue and whether that can
4 argued at closing.

5 We interpreted the Judge's lengthy oral ruling to
6 mean that under the case law while the defense can certainly
7 argue about the absence of evidence, they cannot argue that
8 there was a rush to judgment. And I do not want to rehash
9 the arguments because the Court is very, very familiar with
10 them, but the second issue in which we believe the Court
11 ruled and the defense represented that they weren't going to
12 argue it was the consciousness of innocence related to the
13 testimony of Special Agent Delzotto that the defendant did
14 give a statement. And we were under the impression, which I
15 think is pretty clear in the record that that was only used
16 as a way to impeach Special Agent Delzotto on his view that
17 a lawyer would never speak to the Government. And so we
18 would -- and obviously this impacts closings but we just
19 were seeking clarification from the Court as to the
20 appropriate scope of both of those arguments.

21 MR. DUBIN: Your Honor, we understood Your Honor's
22 evidentiary ruling, but nothing precludes us from making any
23 argument that we feel based on the evidence we can make. We
24 certainly are entitled to and there is nothing that should
25 ever prohibit us from arguing that in our view, our argument

1 is that there was indeed a rush to judgment here. We
2 understand that Your Honor's going to give the instruction
3 and we have read Your Honor's instruction carefully that the
4 Government is not on trial and they do not have to follow
5 any particular investigative technique and we can
6 acknowledge that. But that does not preclude us from saying
7 that there is nothing that prevented them from speaking to
8 Mr. Greebel, that they could have done that and it is for
9 jury to decide. And if we feel that that was a rush to
10 judgment, we should not be precluded from arguing that.
11 Those evidentiary rulings Your Honor made never in any way,
12 shape, or form were intended as we see it, to limit us from
13 making arguments during summation. And with respect to what
14 Special Agent Delzotto testified to, we stayed within the
15 confines of Your Honor's ruling.

16 He offered up testimony as to the reason why he
17 did not speak to Mr. Greebel before arresting him because he
18 was an attorney and that the chances of him speaking were
19 null. We are not going to go much further than comment on
20 his statement on his testimony. We are not going to say
21 that and because he spoke, that was consciousness of
22 innocence.

23 (Continued on next page.)
24
25

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1 (In open court; 5:36 p.m.)

2 MR. DUBIN: So I think with all respect to the
3 Government and we -- Mr. Pitluck and I have a very nice
4 rapport -- we really vehemently disagree with being precluded
5 from making two critical, critical arguments.

6 The rush to judgment is a key to our defense and
7 they can argue that it wasn't and they can give all the
8 reasons why not. But we I've never heard of being cut off
9 from making an argument during submissions. That is perfectly
10 within the bounds of the evidence and, you know, that the case
11 law certainly doesn't prohibit.

12 MR. PITLUCK: So, your Honor, obviously, there are a
13 number of arguments that you can't -- that either side can't
14 make, are precluded legally from making. And I think the
15 Court's ruling and I'm giving a case cite of 9594, sorry,
16 transcript cite of 9594 which says in which the Court said:
17 Thus, the defense certainly may argue that some testimony or
18 document undercuts the Government's proof. It should not,
19 however, focus on the course or timeline of the Government's
20 investigation with a purpose of arguing that had the
21 Government known certain facts at any given point in time it
22 would or should have declined to prosecute Mr. Greebel.

23 THE COURT: Are you going there?

24 MR. DUBIN: No, I'm not going to say they should
25 have declined to prosecute him. But the very fact that there

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1 are documents that could be -- that are open to
2 interpretation. And there were various witnesses that, you
3 know, that we think that the Government opened and represented
4 that a document meant X and we think we've brought out that it
5 meant Y. So here's where I'm going.

6 THE COURT: That's fine.

7 MR. DUBIN: But we think that had we think that had
8 the FBI or the U.S. Attorney's Office taken the time to sit
9 down with Mr. Greebel and ask his explanation, we might not be
10 here.

11 Now, they can reject that and they can say that the
12 Court is going to instruct you that there's no obligation to
13 conduct an investigation in any particular way and that the
14 Government's not on trial, that's fine, they can argue that.
15 But we shouldn't be precluded from arguing that we think that
16 before you arrest someone you can talk to them.
17 Special Agent Delzotto testified about it and he gave a litany
18 of reasons why he wouldn't want to speak to them, but he also
19 said that nothing precluded him, nothing prevented him from
20 speaking to him first. Why shouldn't we be able to argue
21 that?

22 THE COURT: Well, because it does seem like what
23 you're doing is calling into question the agent's
24 investigative decisions. He was on this case for two years
25 and he made the decision that interviewing Mr. Greebel was not

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1 something that he thought would be advisable and it could
2 impair his investigation. I'm not saying it would have
3 happened, but I think any agent is concerned about destruction
4 of evidence or, you know, colluding or that kind of thing and
5 he made a decision. It was an investigative decision within
6 his discretion about what to do or not do with regard to his
7 investigation.

8 Rush to judgment, as I understand it, we were trying
9 to really understand exactly how it comes up. General rush to
10 judgment comes up if the police have obvious leads to follow.
11 So, for example, in a rape case they don't get a DNA sample
12 from the victim, or they don't get blood samples from a murder
13 scene or something, that would be that. They go ahead and
14 arrest someone where there's obvious evidence that they could
15 have obtained or should have obtained but they make an arrest
16 without fully exploring.

17 It's a different situation to call into question
18 whether an agent should have talked to this person or that
19 person or got documents from source A, B, C at any given
20 point. Think what the focus of the argument is that whatever
21 the agents did. There's insufficient evidence to prove that
22 Mr. Greebel had the appropriate state of mind or they haven't
23 proven the charges set forth in Counts One and Two.

24 MR. DUBIN: Your Honor, they had the opportunity to
25 and nothing prevented them from speaking to him first. And

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1 they can give all the reasons as Mr. -- and I would with all
2 respect to your Honor and the court, he shouldn't have been
3 able to testify, Special Agent Delzotto, but the litany of
4 reasons why he didn't do it first and, your Honor --

5 THE COURT: You asked.

6 MR. DUBIN: But your Honor --

7 THE COURT: You asked.

8 MR. DUBIN: I work on wrongful incarceration cases,
9 it's a big part of my practice. This is no different.

10 THE COURT: But if you --

11 MR. DUBIN: Can I finish?

12 THE COURT: How should you say he shouldn't have
13 been allowed to testify. He said this on direct.

14 MR. DUBIN: Your Honor --

15 THE COURT: You said why didn't you. Why didn't you
16 do this. Why didn't do you that. You didn't do this, did
17 you. And so, but why didn't you speak to Mr. Greebel that was
18 the question.

19 MR. DUBIN: I know, but he gave the reasons why he
20 never spoke to him first. And it wasn't -- that testimony was
21 allowed and now we're being faced with not being able to
22 argue.

23 Your Honor, I work on wrongful incarceration cases
24 and DNA cases and work at The Innocence Project. There are a
25 litany of cases that are no different just because it's a

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1 white collar case if the police have evidence that three
2 witnesses came forward and said person Y did it and the police
3 get a hunch because of the story that they heard from these
4 three witnesses and then don't go out and interview other
5 eyewitnesses.

6 How is that any different than if they get a bunch
7 of documents, don't have the full universe and don't interview
8 witnesses. We think the most appropriate witness was
9 Mr. Greebel. How could they say that we quantity bring that
10 out to the jury.

11 THE COURT: You can't argue as a matter of law that
12 a law enforcement officer is obligated to interview the target
13 of their investigation.

14 MR. DUBIN: I don't intend to do that.

15 THE COURT: Or that it's a rush to judgment. That's
16 basically what you're saying. That Mr. Greebel should have
17 been interviewed because he wasn't.

18 MR. DUBIN: Just to clarify. At the risk of
19 stepping on your words which I don't intend to do.

20 THE COURT: I'm sorry. If I interrupted you.

21 MR. DUBIN: No, that's okay. I think that you have
22 credit in the bank on that one.

23 My point is that I am not going to say that he was
24 under an obligation to interview him or any obligation. All I
25 simply intend to say is that that was an option available to

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1 him. And for whatever reason he testified to and the
2 Government can argue, he decided not to do that.

3 Why should I be precluded from saying that to the
4 jury? He has his reasons why. He espoused those reasons
5 before this jury. How is it, your Honor, that I can't say,
6 well, we disagree with that.

7 I mean, this man has been put I understand there's a
8 lot at stake for both sides but he has been for two years with
9 this cloud over him. All he ever wanted to say was let me
10 give you my explanation.

11 THE COURT: What you're doing is you're disagreeing
12 with the investigative decisions of a law enforcement officer
13 and that's what I believe the case law counsels against.

14 MR. DUBIN: It doesn't --

15 THE COURT: It's fine to say the Government did a
16 lousy job and, therefore, they don't have sufficient evidence
17 to convict Mr. Greebel. They have, in fact, all the evidence
18 that that was presented. The full totality before the jury,
19 in fact, is not only insufficient but, you know, it's
20 exculpatory. If you're going to go there.

21 But I think that you can't second guess by saying
22 that Mr. Delzotto, Agent Delzotto should then A, B, and C, and
23 talk to X, Y, and Z person and solicited documents. That does
24 go to the heart of law enforcement discretionary decisions
25 about how to conduct an investigation and the jury will be I

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1 think --

2 MR. DUBIN: Your Honor, there is nothing in the case
3 law, period of whatsoever, that precludes us from arguing
4 about the sufficiency of the investigation. They can argue
5 against it. And I submit to your Honor, if we're cut off from
6 making this argument, the record is going to be rife with a
7 big problem, really. I say that with all respect, your Honor,
8 not in a way.

9 THE COURT: It's not about sufficiency of the
10 evidence. You can make all the arguments you want.

11 MR. DUBIN: It's not about sufficiency of the
12 investigation. We think that this was an incomplete
13 investigation and that there was a rush to judge Evan Greebel.
14 I'm getting so animated because I can't even believe that the
15 Government's taking this position and that we would be faced
16 on the eve of closings that we can't argue that they never
17 spoke to this man and he had an explanation.

18 There is nothing whatsoever in Second Circuit case
19 law that says we are precluded from making that argument
20 especially when the record as it stands has
21 Special Agent Delzotto going through a litany of reasons why
22 he did it. They have their argument, we have ours. I'm not
23 going to say he was obligated to do it. I'm not going to say
24 that, you know, I'm going -- I am actually going to
25 acknowledge your Honor's instruction. I am going to

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1 acknowledge that, look, respectfully, the judge will give you
2 the instructions at the end of the trial and we're not putting
3 the Government on trial. I'm going to acknowledge that.

4 But they're certainly able to use their common sense
5 and say you know what, to me, it seems like why not speak to
6 him. And there is nothing that prohibits us in the case law
7 from making that argument.

8 Again, I am not going to get into that he was
9 obligated to do it, that there was some sort of code that says
10 he should do it, but there is just no authority to prevent us
11 from making there argument.

12 MR. PITLUCK: Respectfully, your Honor, we disagree.
13 We think that the authority that the Court has cited is clear.
14 We think that this has been espoused by the Court throughout
15 the trial.

16 Mostly importantly, as the Court pointed out, the
17 rationale for Special Agent Delzotto's decision not to
18 interview the defendant was elicited on cross. I didn't raise
19 it on direct, it's inappropriate.

20 And, Judge, what I'm hearing is, if they have spoken
21 to him, he would have given exculpatory explanations for
22 everything.

23 MR. DUBIN: That's not what I'm going to say.

24 MR. PITLUCK: How do we respond to that? That's the
25 reason why this is precluded.

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1 THE COURT: It's just -- it creates an impression
2 that had they spoken to Mr. Greebel, or had they spoken to
3 other of his partners or anyone else that you were examining
4 Agent Delzotto about that the Government would never have
5 brought this prosecution which is just not appropriate.

6 MR. DUBIN: I'm not going to say that.

7 THE COURT: What the agent was so rabidly determined
8 to prosecute Mr. Greebel that he ignored all other evidence
9 and willfully blinded himself to other evidence.

10 MR. DUBIN: I don't think it's willful. I think
11 great cops, and I think great agents, it happens. It does
12 happen and it happens far too often where they think that they
13 have the right guy and they think that their theory is right
14 and they make the ends justify the means. And not for a
15 moment would I stand before this court and think there is any
16 ill motive. I have deep respect for law enforcement and
17 especially the FBI. But unfortunately, your Honor, in our
18 country, and I think your Honor is aware, it happens. And I
19 think tunnel vision is a real thing. In fact, I know it's a
20 real thing.

21 So I'm not saying he willfully blinded himself or
22 anything like that. I think that he had a reason why he
23 thought it was a certain way, and whether he was unwilling to,
24 didn't want to, was -- that's for the jury to decide.

25 But we know of no authority that prevents us from

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1 making this argument and I think it is extraordinarily
2 prejudicial to us not to be able to bring -- I will not for a
3 moment suggest that he would have not been charged. I will
4 not for a moment suggest that he violated some investigatory
5 protocol or anything like that.

6 What I plan to say is that this was available to
7 him, and for the reasons that he put before the jury, he
8 didn't. We think he should have.

9 MR. KESSLER: The only conceivable reason to bring
10 that up is to suggest that Mr. Greebel would have said
11 something exculpatory there's absolutely nothing else.

12 MR. PITLUCK: It's also directly putting the
13 Government on trial which is contrary to the Court's position.

14 Respectfully, Judge, I promised the court reporter
15 we would be brief, it's 6:00 o'clock on the eve before closing
16 and I think also I'm getting an underpinning of consciousness
17 of innocence which Mr. Dubin represented clearly to the at the
18 time we were and I don't like using transcripts cites, but the
19 time we were discussing what Special Agent Delzotto could be
20 asked it was clear do everybody that the Government or that
21 the defendant's willingness to speak to law enforcement would
22 not be used for consciousness of continues and it seems like
23 these two are conflating.

24 So we're just before we go back and try to finalize
25 our summations and 14 short hours, we just -- we respectfully

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1 just ask the Court to give us guidelines because I don't think
2 either party wants to be objecting during closings.

3 THE COURT: I mean. My decision on this point was
4 based on what I believe the Second Circuit has stated which is
5 the law enforcement techniques and decisions, discretionary
6 decisions, they make as to how to conduct their investigation
7 is not ruling an appropriate issue for the jury.

8 If, however, the law enforcement techniques amount
9 to an insufficiency of the evidence that you bring that
10 there's evidence that the law enforcement overlooked neglected
11 didn't pursue and that is insufficient to convict Mr. Greebel.
12 That is acceptable and the case law supports that. But it
13 call into question the timing and who they talk to and what
14 documents they got and when they got them, that it starts to
15 sound and feel and directly point the jury to questioning the
16 legitimacy of the Government's investigation.

17 MR. DUBIN: Understood, your Honor. I think I made
18 the record. If you have some spare time tonight, if you do
19 happen to look at a case, or what we submitted on this.

20 THE COURT: We did at look at your cases.

21 MR. DUBIN: Okay.

22 THE COURT: We did our own research, too.

23 MR. DUBIN: Understood. I will focus on the
24 insufficiency of the evidence.

25 THE COURT: Right.

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1 MR. DUBIN: Is permissible for me to tie that that
2 the insufficiency is because there was -- I mean, I'm trying
3 to make sure that I stay within the confines and don't draw an
4 objection. But the fact that certain people weren't
5 interviewed until this summer, I have to be permitted to bring
6 that out. How is that not relevant? People were asked those
7 questions during the trial. It's in the record.

8 How could I not argue that that, you know, there was
9 an insufficiency of the evidence and certain witnesses weren't
10 even interviewed until the summer. Of course, they -- but
11 that's okay.

12 I respectfully think that that is so permissible. I
13 don't know anything that will preclude the timing of the
14 investigation has nothing to do with, you know, the manner in
15 which they get evidence goes directly to the insufficiency of
16 the evidence.

17 If Mr. Greebel has already been charged, and sits
18 here under indictment facing these charges. And then
19 witnesses that have critical evidence are only interviewed
20 after the fact, and the charges aren't dropped and the case
21 not dismissed, how could we not argue that he is sitting here
22 but critical evidence, there's a insufficiency of the evidence
23 because they didn't speak to people that we think would have
24 been critically relevant to the determination of whether or
25 not he did something wrong.

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1 MR. KESSLER: The insufficiency is the evidence is
2 evaluated now. Michael Rosensaft came in and testified. Any
3 argument about when someone talked to Michael Rosensaft, he
4 was here, they can evaluate the testimony.

5 THE COURT: By arguing that the evidence is
6 insufficient and therefore suggesting that not only the FBI
7 but the Government pursued charges wrongfully is something
8 that I don't think the case law allows.

9 MR. DUBIN: I'm not going to say they pursued
10 charges wrongfully.

11 THE COURT: You're going to say they went ahead
12 because they have didn't interview this witness until X date,
13 or that witness until Y date, because they didn't obtain
14 documents by whatever date you think they should have gotten
15 it, that equals insufficiency.

16 It's fine to argue that they haven't proven and
17 cannot prove and there is insufficient evidence to convict
18 Mr. Greebel. But to tie that to the timing is a side issue
19 what the jury has to consider is what is before them.

20 It doesn't matter whether it was obtained a year
21 ago, six months ago, or four months ago, what matters is what
22 is admissible, what has been put before the jury. They decide
23 the case based on not on the agent's timing, the agent's
24 motive, the Government's motive, their investigative
25 techniques, all of that is not relevant under case law. The

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1 case law, I don't think, allows the arguments that you're
2 proposing.

3 MR. DUBIN: Your Honor, I respectfully disagree. I
4 understand your ruling.

5 THE COURT: We have looked at number of support in
6 your submissions, we didn't find it.

7 MR. DUBIN: I know of no case that stands for the
8 proposition in the Second Circuit and/or in the Ninth Circuit
9 or any other circuit that would preclude the defense from
10 standing up and saying that the Government did not interview
11 critical sources of evidence, witnesses, until this summer. I
12 just cannot fathom that we can't argue that, because they
13 testified to it. And regardless of whether we brought it out
14 or they brought it out, I don't think the Government objected
15 when Katten lawyers took the stand and they weren't
16 interviewed until 2017 and they get up here and they say I
17 never saw him do anything wrong, the man kept me in the loop
18 on things, how can we not argue that they weren't spoken to
19 until 2017?

20 THE COURT: But it still boils down to whether the
21 jury finds beyond a reasonable doubt that there is sufficient
22 evidence to convict Mr. Greebel. It doesn't matter when or
23 how that evidence was obtained. What matters is the evidence
24 before the jury sufficient. By saying it's a timing issue
25 that somehow is relevant and goes to the sufficiency is not

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1 accurate.

2 I think that what you could say is that the evidence
3 itself is not sufficient. Also, if there had been missed
4 opportunity, that if a key witness was not interviewed, that
5 witness has died, and that witness, there is evidence that
6 that witness would have said X, Y, Z, that's a different
7 situation. But that's not what we have here.

8 We have a body of evidence that's been presented to
9 the jury and when and how they got it --

10 MR. DUBIN: So your Honor --

11 THE COURT: -- is irrelevant.

12 MR. DUBIN: I want to make sure I don't run afoul.
13 This is the last question I ask. I understand your ruling and
14 I will make the necessary adjustments.

15 Is it your Honor's position that I can't say the
16 words "there was a rush to judgment here."

17 THE COURT: I know that's your theory. When you say
18 rush to judgment, what do you mean? When you make that
19 argument, what would you back it up with?

20 MR. DUBIN: I mean -- well, I don't want to give
21 away my whole --

22 THE COURT: I know, I'm trying to think. The
23 summation is a summation of the evidence, okay. We have
24 evidence as to what the agent did --

25 MR. DUBIN: Your Honor --

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1 THE COURT: -- or what he didn't.

2 MR. DUBIN: -- there is certain documents that we
3 had to bring out that we think that why, if they are saying
4 Mr. Greebel did X, Y, Z and we say, no, no, that's not so.
5 Take a look at B, C, D and we brought that out, why did that
6 have to happen? We submit that it's because there was a rush
7 to judgment. That there is an assumption that he was guilty
8 and that they worked backwards from that proposition.

9 I'm not impugning the Government or saying that they
10 had some ill will in doing it. I'm not even going to mention
11 the Government. I should certainly be able to make that
12 argument.

13 MR. KESSLER: That's the same argument that the
14 Court just ruled shouldn't be made.

15 MR. DUBIN: It is not.

16 MR. KESSLER: The words, an hour ago, a week ago, or
17 a year ago B, C, D before the jury, if it shows the evidence
18 is insufficient, it isn't.

19 MR. DUBIN: I've never had the contours of an
20 argument sculpted like this. I just, I'm so exacerbadated
21 because I've never heard that a defendant be precluded from
22 saying there was a rush to judgment.

23 MR. PITLUCK: Both parties are regularly precluded
24 making legally improper arguments. And we heard the Court's
25 ruling. We'd love to go work on this. It seems very clear to

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1 me what is appropriate and what is not. The Court has, I
2 think, made it abundantly clear that timing does not matter.
3 How something was discovered does not matter. What matters is
4 what is before the jury.

5 MR. DUBIN: What I'm struggling with is I'm talking
6 about the timing of something that didn't happen. How would I
7 prove it?

8 THE COURT: I am just trying --

9 MR. DUBIN: For instance --

10 THE COURT: -- talking about a timing of something
11 that happened.

12 MR. DUBIN: -- let me give you a good example. If
13 I'm not able to draw out the timing of when a certain's
14 interview is after the fact, a few months ago, for instance,
15 then that witness, the government never had that, right, it
16 wasn't baked into the equation at all. So the jury, if I
17 can't draw out the timing, what this jury might be left to
18 think or believe is that, well, because I don't know when that
19 person was interviewed or when the Government got that
20 evidence it might be that they looked at that, didn't think
21 that it mattered.

22 That's why the timing is so critical, your Honor,
23 for us. So in other words --

24 THE COURT: But the timing, okay, getting to your
25 point, suppose they discovered three weeks before trial that

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1 some witness would say something that would completely
2 exonerate Mr. Greebel and/or so strongly exculpatory the
3 Government has folded and withdrawn a prosecution under those
4 rare circumstances where that happens.

5 The timing is not critical to that decision. What
6 is critical is whether or not the Government, based on its
7 discovery or change of circumstances could prove its case
8 beyond a reasonable doubt. So I think, see, the timing I
9 think is a little bit of a distraction and it's just not a
10 relevant factor.

11 MR. DUBIN: It's really going to present huge
12 problem for us, your Honor. I think the jury ends up left
13 with a misimpression that the Government had this evidence all
14 along and just considered it and for whatever reason decided
15 to press forward. And I think that it is just critical that
16 we be able to show when they obtained certain information.

17 And your Honor is going to give the instruction,
18 that's why the instruction is there, that there is no
19 particular investigative techniques. If we weren't able to
20 talk about the investigative techniques, it would obviate the
21 need for that instruction, you wouldn't need that instruction.
22 Of course we can talk about it.

23 I mean, we can talk about the sufficiency of the
24 investigation or the insufficiency of the evidence. I
25 understand your Honor's ruling with respect to a rush to

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1 judgment, but just to preclude us from talking about the
2 timing of when witnesses were interviewed, that I think is
3 just, I don't even know how we could close on that.

4 THE COURT: What would the point be what inference
5 you would want the jury to make of that? Because the
6 Government didn't interview Katten lawyers until the summer or
7 whenever and hear positive things about Mr. Greebel, yet they
8 still went ahead, is the inference that the Government is just
9 rapidly pursuing Mr. Greebel regardless of what the evidence
10 shows?

11 MR. PITLUCK: Judge, that's the exactly, the Court
12 held this -- I'm sorry, but we want to go -- the Court held
13 the timing is not relevant. And Mr. Dubin just keeps arguing
14 in different ways that the timing is relevant to the jury's
15 determination of guilt or innocence. It is not. It is the
16 evidence, not when it is obtained or how it is obtained.
17 There is a number of factors. That's were the case law says
18 this. Your Honor, this has been briefed before the Court for
19 literally months.

20 MR. DUBIN: Not this issue, your Honor, this has not
21 been briefed before the Court. With all respect to
22 Mr. Pitluck, he just raised it to me. I'm responding to it.
23 I never thought in a million years we would be up here, we
24 would get an objection to making a summation and how we want
25 to argue it. I just I can't --

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1 MR. PITLUCK: We raised it because in the abundance
2 of caution. We thought the Court's ruling has been and
3 continues to be very clear. Respectfully, Judge, I don't want
4 to keep arguing, this we want to go work on summation.

5 MR. DUBIN: This is the last thing I'll say, please
6 take a look at this because we agree a summation is a
7 summation of the evidence. We agree completely. The evidence
8 is, from the our point of view, that key witnesses were not
9 interviewed. That goes directly to the heart of the
10 insufficiency of the evidence.

11 THE COURT: What key witness wasn't --

12 MR. DUBIN: I don't want to reveal. I'm going to
13 say it in 12 hours, tomorrow. There were key witnesses, in
14 our mind, that were never interviewed, that came in here and
15 testified --

16 THE COURT: Would you asking to speculate what those
17 witnesses would say? And the instruction that I give says
18 both parties are able to get evidence and the parties should
19 not speculate about what -- evidence not before you might have
20 shown or what it would be. It's inviting speculation what
21 that key witness would have said.

22 MR. DUBIN: No, they said it on the witness stand,
23 what they would have said. They testified.

24 MR. PITLUCK: They are trying to say key witnesses
25 who testified here, who's testimony is before you, didn't give

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1 their testimony earlier. That is directly foreclosed by the
2 case law.

3 THE COURT: But the jury will say based on that key
4 witness's testimony here before the trial whether, A, they
5 find it credible; B, they are going to give it weight or no
6 weight. And the evidence is the evidence. They are going to
7 evaluate. If there is a key witness out in the ether who you
8 think should have been spoken to and should have been called
9 into court to testify, that's the instruction that says you
10 can't, the jury shouldn't speculate about those witnesses
11 whoever they may be.

12 MR. DUBIN: The witnesses came into this court and
13 said certain things about the evidence and Mr. Greebel. Okay.
14 They were never interviewed by the Government, some of them.

15 Is it the Court's ruling I can't bring that out?

16 THE COURT: The jury will evaluate what the witness
17 had to say about issues relevant to the case.

18 MR. DUBIN: But I want to be able to say to the jury
19 they never interviewed this person. How can it be that that
20 critical evidence that the witness testified to and gave that
21 testimony, that they never interviewed them? With all
22 respect, I really do think this would create a major problem.
23 I would urge the Court just to take another look.

24 I know how thorough your Honor is, and you read the
25 cases known, perhaps with more thoroughness than is even

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1 required sometimes, I just think that for us not to able to
2 argue about their investigation whatsoever, to be foreclosed
3 from that, I think is a big problem.

4 THE COURT: I said you could argue that their
5 investigation did not yield sufficient evidence to convict
6 Mr. Greebel. The case law says you can do that. I would not
7 preclude you from doing that. To the extent you can link the
8 investigation to the sufficiency of the evidence, that is
9 acceptable.

10 I think ultimately the jury has to decide the case
11 based on the evidence at this trial. Not based on when it was
12 obtained and how it was obtained and from whom it was
13 obtained.

14 Unless your argument is the next logical step, and
15 all of that equals overwhelming evidence of exculpatory
16 evidence and therefore the Government by pursuing this must be
17 operating in bad faith.

18 MR. DUBIN: That's not what I'll be arguing.

19 THE COURT: That's the logical conclusion.

20 MR. DUBIN: What we're asking the jury, and there is
21 no case law out there that says that we cannot say in a
22 closing argument, that they indicted, that Mr. Greebel was
23 indicted without the benefit of the evidence, all of the
24 evidence that you saw here.

25 MR. KESSLER: That's exactly the argument that's

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1 foreclosed. We've done this six times.

2 THE COURT: The Grand Jury, yes, it's been said they
3 will indict a ham sandwich. But the bottom line is there was
4 a Grand Jury, the Grand Jury issued the Indictment, the Grand
5 Jury issued a Superseding Indictment. So they found probable
6 cause, not proof beyond a reasonable doubt, they found
7 probable cause to charge Mr. Greebel as they did, as it did in
8 the Indictment.

9 And the Government, whether or not they talked to
10 witness A, B, C, as I said, later than you think they should
11 have, is irrelevant to whether or not the jury in looking at
12 the evidence is going to find that there is sufficient
13 evidence to convict Mr. Greebel.

14 MR. DUBIN: Okay. Your Honor, I disagree.

15 THE COURT: We're going around in a circle.

16 MR. DUBIN: We're stuck now. There being testimony
17 in the record where people have testified that they were not
18 interviewed until the summer this year, then we're left with
19 nothing to do with it.

20 THE COURT: I know that was brought out on cross.
21 There might have been an objection or I might have overruled
22 it.

23 MR. PITLUCK: Just because evidence is elicited
24 doesn't mean it can be used to be marshal into improper
25 argument. I think that's clear. Judge, I think --

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1 MR. DUBIN: How else can we use it? I can't refer
2 to testimony in the record now?

3 THE COURT: Can you do that. Please don't make this
4 worse; don't put words in my mouth.

5 MR. DUBIN: I have not.

6 THE COURT: I didn't rule that you can't refer to
7 evidence in the record. If it hasn't been stricken, it's fair
8 ground for argument. I'm just saying what I think the case
9 law permits and what it doesn't permit.

10 MR. DUBIN: I'm going to then, so I had don't run
11 afoul, I'm going to say that X person who was interviewed for
12 the first time, he testified to X. I won't make an argument
13 about it.

14 THE COURT: He was interviewed for the first time in
15 August of 2017.

16 MR. DUBIN: Okay. Thank you, your Honor.

17 THE COURT: If you have a case that tells me that I
18 need to let you do this, I've had so many submissions on this.
19 I know that your team is very, highly staffed, highly skilled,
20 highly experienced team, we didn't find cases and you didn't
21 present cases. If you have find cases contrary --

22 MR. DUBIN: If I find one --

23 THE COURT: Don't give me from the District of Ohio,
24 with all do with respect to my colleagues in Ohio. Second
25 Circuit, Supreme Court, that is controlling the law that would

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1 frame what would be appropriate and what wouldn't be
2 appropriate.

3 I've tried to make the best call I can based on what
4 I understand the law to be.

5 MR. PITLUCK: There is, to be clear, there is no
6 other purpose to elicit the timing when someone was
7 interviewed other than to imply that it was before X, or after
8 Y, or before Y.

9 The notion that because something is in the record
10 and hasn't been stricken could be marshaled or addressed,
11 there were all sorts of things that were precluded that are in
12 the record. The timing of evidence is not relevant. That's
13 clear. So there is no reason to say not interviewed until
14 this specific time.

15 MR. DUBIN: Now I'm told Mr. Pitluck is saying
16 forget about marshaling it or making a comment, now Mr.
17 Pitluck argues is I can't refer to testimony in the record.

18 THE COURT: He can refer to evidence in the record.
19 That's what you can do in a summation. How he, what kind of
20 argument he makes based on the evidence is, I think, we made
21 it clear.

22 MR. KESSLER: So then where we stand is --

23 THE COURT: You might find a reason to argue from --

24 MR. DUBIN: I might just read the question and
25 answer.

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1 I understand the Court's ruling. It's the last
2 thing I want to do, is draw an objection during the summation.
3 I'll be very careful. If I find a case that is so on point
4 that I'm jumping out of my skin tonight --

5 THE COURT: You know, the argument is about there is
6 reasonable doubt, there is insufficient evidence --

7 MR. DUBIN: I understand.

8 THE COURT: -- this witness is incredible, this
9 witness was motivated by X, Y, Z, that's the kind of argument
10 that is typical. It's focused on the evidence, sufficiency of
11 it, and the weight that it should be given, that kind of
12 thing.

13 MR. DUBIN: Good evening.

14 THE COURT: The consciousness of innocence.

15 MR. KESSLER: That argument is not going to be made.
16 And the Court made it clear it will be stricken if we object.

17 MR. PITLUCK: Thank you.

18 MR. DUBIN: Thank you.

19 (Proceedings adjourned at 6:20 p.m. to resume on
20 Wednesday, December 20, 2017 at 9:00 a.m.)

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